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EDITOR'S NOTE

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o. 85-62-AFX
tatus: GRANTED

Title: Maine, Appellant
v.
Robert J. Taylor and United States

ocketed:
uly 9, 1985

Court: United States Court of Appeals
for the First Circuit

Counsel for appellant: Cabanne,Howard

Counsel for appellee: Solicitor General, Mittel,Robert E.

ntry	Date	Note	Proceedings and Orders
1	Jul 9 1985	G	Statement as to jurisdiction filed.
3	Jul 22 1985		Order extending time to file response to jurisdictional statement until August 30, 1985.
4	Aug 7 1985		Order further extending time to file response to jurisdictional statement until September 14, 1985.
5	Aug 29 1985		Motion of appellee Robert J. Taylor to dismiss or affirm filed.
6	Sep 11 1985		Order further extending time to file response to jurisdictional statement until October 14, 1985.
7	Oct 8 1985		Brief of appellee United States filed.
8	Oct 16 1985		DISTRIBUTED. November 1, 1985
9	Nov 4 1985		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
10	Dec 9 1985		Record filed.
11	Dec 9 1985		Certified copy of C. A. proceedings received.
12	Dec 19 1985		Brief of appellant Maine filed.
13	Dec 19 1985		Brief of appellee United States supporting appellant filed.
14	Dec 18 1985		Joint appendix filed.
17	Dec 31 1985	G	Motion of The Solicitor General for divided argument filed.
18	Jan 13 1986		Motion of The Solicitor General for divided argument GRANTED.
19	Jan 23 1986		Brief of appellee Robert J. Taylor filed.
20	Feb 4 1986		SET FOR ARGUMENT, Monday, March 24, 1986. (2nd case)
21	Feb 4 1986		CIRCULATED.
23	Mar 12 1986	X	Reply brief of appellant Maine filed.
24	Mar 24 1986		ARGUED.

JURISDICTIONAL

STATEMENT

85-62

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MAINE

Appellant

AND

UNITED STATES OF AMERICA

v.

ROBERT J. TAYLOR

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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July 9, 1985

Question Presented

May the State of Maine, consistent with the Commerce Clause and the Lacey Act Amendments of 1981, prohibit the importation of live bait fish in order to protect its ecology from diseased and exotic wildlife?

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In The

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STATE OF MAINE

Appellant

AND

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v.

ROBERT J. TAYLOR

Appellee.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit, which appears at Appendix A hereto, *infra*, was issued on January 18, 1985, and is reported at 752 F.2d 757.

The Memorandum and Order of the United States Court of Appeals for the First Circuit denying the petitions of the United States and the State of Maine for rehearing, which appears as Appendix B hereto, *infra,* was issued on April 10, 1985, and is not reported.

The Order of a majority of the judges of the United States Court of Appeals for the First Circuit denying the suggestion of the United States and the State of Maine for rehearing *en banc,* which appears at Appendix C hereto, *infra,* was issued on April 11, 1985.

The opinion of the United States District Court of the District of Maine, which appears at Appendix D hereto, *infra,* was issued on April 25, 1984, and is reported at 585 F. Supp. 393.

The Report and Recommended Decision on Defendant's Motion to Dismiss of the United States Magistrate for the District of Maine, which appears at Appendix E hereto, *infra,* was issued on February 29, 1984, and is not reported.

Jurisdiction

In this case, the United States Court of Appeals for the First Circuit has held a statute of the State of Maine, 12 M.R.S.A. §7613, which prohibits the importation of live bait fish into the state, invalid as repugnant to the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3, federal jurisdiction having been invoked under 28 U.S.C. §3231 (federal crimes).

The judgment of the Court of Appeals was entered on January 18, 1985; the petition of the United States and the State of Maine for rehearing was denied on April 10, 1985; the suggestion of the United States and the State of Maine for rehearing *en banc* was denied on April 11, 1985; and a notice of appeal therefrom was duly filed with the Court of Appeals on May 13, 1985. A copy of the notice is set forth at Appendix F.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

Constitutional and Statutory Provisions

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, provides, in pertinent part:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, . . .

The Lacey Act Amendments of 1981, 16 U.S.C. §3371 *et seq.,* provide, in pertinent part:

> It is unlawful for any person —
>
> * * * *
>
> (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce —
>
> (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State . . . 16 U.S.C. §3372(a).

Title 12, Maine Revised Statutes Annotated, Section 7613 provides:

> A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters.

Statement of the Case

A. *The Statutory Structure.*

In 1959, the Maine Legislature enacted "AN ACT Regulating Live Bait for Fishing," Laws of Maine of 1959, ch. 112, which, *inter alia,* prohibited the importation of live bait fish into the State. This prohibition now appears at 12 M.R.S.A. §7613. In 1981, the Congress enacted the Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (1981), enacting 16 U.S.C. §3371, *et seq.,* which makes it a violation of federal law, *inter alia,* to import any fish into any State in violation of that State's laws. 16 U.S.C. §3372(a)(2)(A). The purpose of the amendments, as revealed in the report of the Senate Committee hearing the bill, was to allow "the Federal government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife." S. REP. No. 97-79, 97th Cong., 2d Sess. at 4, *reprinted in* 1981 U.S. CODE CONG & AD. NEWS 1748, 1751. The Maine statute thus furthers a strong national policy to allow states to identify threats to their particular ecologies and to legislate against those threats.

B. *The Litigation.*

On February 24, 1983, the defendant in this case, Robert J. Taylor, was indicted in the United States District Court for the District of Maine for violating the Lacey Act and the Maine statute by importing over 158,000 golden shiners into the State of Maine, and for conspiring to do so in violation of 18 U.S.C. §371. On March 30, 1983, he moved to dismiss the indictment on the ground that the underlying statute, the Maine act, constituted an impermissible barrier to interstate commerce in violation of the Commerce Clause. On June 16, 1983, because the constitutionality of one of its statutes had been drawn into question, the State of Maine was given notice, pursuant to 28 U.S.C. §2403(b), of the pendency of the defendant's motion and on September 23, 1983 was permitted to intervene as a party to the action.

On November 9, 1983, a hearing was had on the defendant's motion before the Honorable D. Brock Hornby, United States Magistrate for the District of Maine. At the hearing, the State presented evidence that its statute, though it concededly discriminated against interstate and foreign commerce, was constitutional in that it satisfied the requirements of *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979) that a barrier to commerce may stand if it "serves a legitimate local purpose" and, if so, that no "alternative means" exist which "could promote this local purpose as well without discriminating against interstate commerce." *Id.* at 336. The thrust of the State's evidence, consisting of the testimony of three experts, including the State Fish Pathologist, was that its statute was necessary to protect its ecology against the introduction of various specific parasites and exotic species of fish, some of which were actually found in the defendant's shipment; and that an absolute prohibition, rather than an inspection program, was the only practicable means available to the State to defend itself, since the scientific community has not as yet developed satisfactory sampling and certification procedures for bait fish.

On February 29, 1984, the Magistrate entered a Report and Recommended Decision which, after a thorough review of the evidence presented by both parties, determined that the State had met its burden of satisfying the *Hughes* test, that the statute was constitutional and that the indictment should not be dismissed.* (Appendix E)

The defendant then filed objections to the Magistrate's recommendations with the District Court; but, on April 25, 1984, the Court (Cyr., C.J.) entered an extensive opinion, entitled "Ruling on Magistrate's Report and Recommended Decision," which agreed with the Magistrate in all respects.

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*In sustaining the Maine statute, the Magistrate rejected an alternative argument put forth by the State that the statute had been incorporated into federal law by the Lacey Act and was thus constitutional even if it failed to satisfy the *Hughes* test. Magistrate's Report and Recommended Decision (Appendix at E-2 to E-4). The District Court agreed with this result (Appendix at D-2, n. 3), 585 F. Supp. at 394, n. 3, as did the First Circuit (Appendix at A-10 to A-14), 752 F.2d at 763-65.

United States v. *Taylor* (Appendix D) 585 F. Supp. 393 (D.Me. 1984). The Defendant then pled guilty, on June 28, 1984, to the indictment, was fined $3000 on each of its two counts, and appealed.

On January 18, 1985, the United States Court of Appeals for the First Circuit reversed, rejecting the factual findings of the Magistrate and the District Court and finding instead that the State's purpose in enacting its statute was not legitimate and that alternative means for dealing with the problem (namely, an inspection program) existed. *United States* v. *Taylor* (Appendix A) 752 F.2d 757, 762-63 (1st Cir. 1985) (Maletz, J. (sitting by designation)). Maine and the United States immediately petitioned the panel which decided the case for rehearing and suggested that the Court rehear the case *en banc,* essentially on the ground that the panel had impermissibly rejected the factual determinations of the District Court and had in effect re-tried the case itself. On April 10, 1985, the panel entered a Memorandum and Order denying the petition for rehearing, in which it declared itself "free to examine carefully the factual record and to draw its own conclusions" (Appendix at B-2). On April 11, 1985, a majority of the five members of the First Circuit denied the suggestion for rehearing *en banc* (Appendix at C-2). This appeal followed (Appendix F).

The Question Presented is Substantial

A. *The Decision of the Court of Appeals Adopts an Obviously Incorrect Standard of Review of a Trial Court's Determination of Issues of Constitutional Fact, and Should be Summarily Reversed.*

In *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979), this Court held that a state may constitutionally erect a barrier to interstate or foreign commerce if (1) the barrier "serves a legitimate local purpose" and (2) there are no "alternative means" which "could promote this local purpose as well without discriminating against interstate commerce." *Id.* at 336. In this case, both parts of this test are met, as the State of Maine demonstrated by means of extensive expert testimony at the hearing before the United States Magistrate. The State's twenty-five year old prohibition against the importation of bait fish was first shown to be necessary in order to protect its ecology against various types of parasites and exotic aquatic species. Second, it was demonstrated without contradition that the scientific community has not as yet developed satisfactory sampling and certificate procedures for such fish, making any other method of dealing with the problem impracticable. See the extensive summary of the evidence presented by both parties contained in the Report and Recommended Decision of the Magistrate (Appendix at E-5 to E-11) and the District Court (Appendix at D-3 to D-9; 585 F. Supp. at 395-98).

1. *Standard of Review.*

On the basis of the State's showing, both the Magistrate and the District Court upheld the statute. On appeal, however, the United States Court of Appeals for the First Circuit reevaluated the evidence in a manner that is fundamentally inconsistent with the principles of appellate review of questions of constitutional fact set forth by this Court. According no deference to the trial court whatever, the Court of Appeals reversed its factual determinations, declaring that it "was free to examine carefully the factual record and to draw its own conclusions." See the Memorandum and Order of the panel which decided the appeal, denying the petitions of the United

States and the State of Maine for rehearing (Appendix at B-2).

This approach to appellate review in cases involving issues of "constitutional fact" is completely at odds with the decisions of this Court. As the Supreme Court has stated:

> [I]n constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.

Norton Co. v. *Department of Revenue,* 340 U.S. 534, 538 (1951) *quoted in, Container Corp. of America* v. *Franchise Tax Bd.,* 436 U.S. 159, 176 (1983). "It will do the cause of legal certainty little good if this Court turns every colorable claim that a . . . [trial] court erred . . . into a *de novo* adjudication, whose unintended nuances would then spawn further litigation, . . . " *Id.* cf. *Anderson* v. *City of Bessemer City,* ___ U.S. ___, 105 S.Ct. 1504, 1511-13 (1985). As a review of the specifics of its decision will show, the First Circuit in this case undertook such a *de novo* review, disregarded the well-supported findings of the Magistrate and the District Court, and substituted therefor factual determinations which find little or no support in the record.

2. *Legitimate Local Purpose.*

On the issue of the legitimacy of the State's purpose, the First Circuit summarily dismissed Maine's evidence relating to the threat to its ecology posed by certain enumerated types of parasites and exotic species, some of which were present in the very shipment seized from the defendant, and instead determined that the statute was motivated by "economic protectionism" (Appendix at A-7 to A-8; 752 F.2d at 762). The only evidence of such a motive in the record was a three sentence statement in a four and one-half page single-spaced document prepared by the Maine Department of Inland Fisheries and Wildlife in opposition to a proposed repeal of the importation ban in 1981, twenty-two years after the statute was enacted. See the discussion of the statement in the

Magistrate's Report and Recommended Decision (Appendix at E-5 to E-6, n. 4).* Thus, the Court of Appeals, having decided to re-try the case itself, determined that a substantial volume of expert testimony introduced by Maine, detailing the hazards of permitting unrestricted importation of bait fish, was outweighed by what can only fairly be called a scintilla of contrary evidence.

3. *Alternatives.*

With regard to the availability of alternatives, the First Circuit, without any reference to the record whatever, held that there are inspection methods available to Maine of which it has simply chosen not to avail itself (Appendix at A-8 to A-10; 752 F.2d at 762-63). The record, however, is unequivocally to the contrary. As the District Court held:

> The Fisheries expert [Peter Walker, the State Fish Pathologist] testified that there do not presently exist sampling and certification procedures for warm water bait fish. Tr. 31, 33, 38. This testimony is corroborated by another Government expert, *see* Tr. at 97-100, *and by the defendant's expert witness as well,* see Tr. 139, 140. The unavailability of such procedures is due primarily to disagreement among the scientific community. (Appendix at D-8; 585 F. Supp. at 398) (emphasis added).

Similar findings were made by the Magistrate. (Appendix at E-8 to E-11).

Nonetheless, the Court of Appeals, in its Opinion, advanced three reasons why the lower court's findings should be rejected. First, the Court found it significant that certain other states have statutes establishing fish certification procedures. (Ap-

*The District Court gave the statement even shorter shrift (Appendix at D-2 to D-3, n. 3; 585 F.2d at 395, n. 3), noting that the defendant actually waived his contention of an economic protection motive at the District Court level.

pendix at A-9; 752 F.2d at 762-63). But none of these statutes, which were not cited either to the Court of Appeals or to the District Court by the defendant,* are pertinent to the issue of the practicability of the establishment of an inspection program for bait fish. Several of them (Wisconsin**, Utah*** and Virginia****) merely provide generally that fish may be imported into the state only with the permission of the appropriate state official, which may be granted in some cases after an inspection, but do not deal with bait fish in particular. Under such statutes, which are quite common around the country, a state official could deny a permit to import bait fish on the ground that no scientifically acceptable certification method has been developed for such fish. Only one statute

*The defendant did append to his brief in the Circuit a letter of the Mississippi State University Cooperative Extension Service dated September 20, 1983 addressed to fish farmers generally summarizing the regulatory regime concerning the importation of fish in nineteen selected states. The Court cited this letter, which is not in the record of this case, as demonstrating that one of these nineteen states (Tennessee) has a regulation "providing for inspection of out-of-state fish." (Appendix at A-9, n. 15; 752 F.2d at 763, n. 15). In fact, all that the letter says with regard to Tennessee is the following:

> Disease free certifications: Not required, fish may be inspected.

Thus, even assuming that the curious mode of proof of an uncited regulation of a sister state employed here is legally acceptable, the information provided hardly amounts to a showing of the existence and feasibility of a mandatory inspection program for bait fish.

**Wisc. Stat. Ann. §29.535(1) (1973 and Supp. 1984). The Court sites subsection (c) of that statute which deals with stocking of fish only and does not mention a certification program. The main portion of the statute, however, does prohibit importation unless there has been an inspection by State Wardens and a permit issued. The only reference to certification occurs in subsection (d) dealing with salmonids.

***Utah Code Ann. §23-15-12 (1976). This statute prohibits the introduction into state waters (not importation, as the Court's opinion states) of any aquatic wildlife without written permission.

****Va. Code 28.1-183.2 (1979).

cited by the Court, that of Minnesota,* appears to address a type of bait fish (minnows) directly, but contrary to the statement by the Court at note 15, contemplates the issuance of a permit only for their *transportation* "into or through" the state for a period of 12 hours. Otherwise, importation for any other purpose is, as in Maine, prohibited.

Next, the Court suggested that "Maine could send its inspectors to hatcheries in other states and require the exporter to pay for such inspection.** (Appendix at A-9; 752 F.2d at 763). But this proposal, which the Court acknowledged was raised by it for the first time *sua sponte* at oral argument, ignores the major thrust of Maine's case at trial: there is no inspection procedure anywhere in existence which can be employed, regardless of who pays for it.

Finally, the Court flatly stated that Maine could simply use the sampling techniques which it uses for other fish in establishing an inspection program for bait fish. (Appendix at A-10; 752 F.2d at 763). Presumably, this statement refers to 12 M.R.S.A. §7702, quoted at note 11 of the Court's Opinion, which provides for the importation of fresh water fish. But this statute, as an inspection of the diseases enumerated in it reveals, is directed only at salmonids:*** fish for which, the record establishes, valid scientific sampling techniques exist. (Tr. at 31-33). Again, the proposition which Maine demonstrated at trial—that no inspection procedure for bait fish exists—has not been refuted in the Court's Opinion.

* * * *

In short, then, the Court of Appeals misapprehended its role in reviewing District Court factual determinations in cases such as this and then reached a result which finds little or no

*Minn. Stat. Ann. §101.46(6) (1977). A South Dakota statute cited by the Court, S.D. Codified Laws §41-14-30 (1977), contains an identical transportation prohibition, but does not address importation.

**The Court cites as an example of such a procedure Cal. Fish & Game Code §6306 (1984) which concerns the expenses of *in-state* inspections.

***Salmonids, such as salmon and trout, are generally larger than bait fish.

factual support in the record. The State of Maine suggests that these errors are obvious enough to warrant this Court simply to enter an order summarily reversing the decision of the Circuit panel and reinstating the opinion of the District Court.

B. *The Decision of the Court of Appeals Effectively Precludes States from Protecting their Environments from the Importation of Harmful Wildlife, is Contrary to National Policy as Established in the Lacey Act, and Should be Given Plenary Review.*

The upshot of the Court of Appeals decision is to impose upon the states an evidentiary burden for satisfying the *Hughes* v. *Oklahoma* test which will be very difficult indeed to satisfy, since it permits a court to invalidate a wildlife importation prohibition on the basis of the theoretical existence of a "less restrictive" inspection and certification program. The consequence of this holding will be to effectively preclude states from protecting their respective environments from the importation of harmful, diseased or exotic nonnative species of wildlife of any kind. This result is not only one of considerable seriousness to the states, but it flies directly in the face of national policy established by the Congress through the enactment of the Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (1981), enacting, *inter alia*, 16 U.S.C. §3371, *et seq.*

In that Act, the Congress addressed what it termed "a massive illegal trade in fish and wildlife" which threatens "grim environmental consequences." S. REP. No. 97-79, 97th Cong., 2d Sess. at 4, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748. Accordingly, it found that:

> It is desirable to extend protection to species of wildlife not covered by the Lacey Act, and to plants which are presently not covered at all. States and foreign government [sic] are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of those governments. *Id.* at 1750-51.

Thus, the Congress provided, at 16 U.S.C. §3372 (a)(2)(A), that it be a violation of federal law for any person to transport fish or wildlife in interstate commerce in violation of state law.

The national policy behind this enactment is substantially undercut by the Court of Appeals' decision. The Lacey Act Amendments encourage the states to identify threats to their particular environments posed by the importation of particular species of wildlife and to legislate against those threats. However, if the Court of Appeals' decision is allowed to stand, the states will be discouraged from so legislating, since they could only expect the strictest scrutiny from the courts for compliance with the *Hughes* v. *Oklahoma* test, as if the Lacey Act Amendments were never enacted. The State of Maine does not believe that this result was intended either by this Court, in enunciating the *Hughes* test, or by the Congress, in enacting the Lacey Act Amendments. Accordingly, it suggests that if this Court does not summarily reverse the Court of Appeals' decision, it should grant plenary review of the case, in order to address an important question of federal-state relations.

Conclusion

Because the decision of the Court of Appeals in this case conflicts with those of this Court with regard to the proper standard of review in cases of constitutional fact, and because the Court of Appeals' decision finds little or no factual support in the record, this Court should summarily reverse that Court's decision and remand the case with instructions to reinstate the decision of the District Court; or

Because this case presents an issue of national importance—whether the decision of the Court of Appeals is consistent with national policy as enunciated by the Congress in the Lacey Act Amendments of 1981—the Court should note probable jurisdiction and accord the case plenary review.

Respectfully submitted,

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July 9, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1699

UNITED STATES OF AMERICA,
Appellee,
v.
ROBERT J. TAYLOR,
Defendant, Appellant.

Before
BREYER and TORRUELLA, *Circuit Judges,*
and MALETZ,* *Senior Judge.*

January 18, 1985

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*Of the United States Court of International Trade, sitting by designation.

MALETZ, *Senior Judge.*

A Maine statute provides: "A person is guilty of importing live bait if he imports into this state any live fish, including smelts, which are commonly used for bait fishing in inland waters." Me. Rev. Stat. Ann. tit. 12, §7613 (1981). The question presented is whether this statute violates the Commerce Clause, art. I, §8, cl. 3, of the United States Constitution. We hold that it does and accordingly reverse the district court's denial of defendant's motion to dismiss his indictment under that statute.

I. *Background*

Defendant was charged in a two-count indictment under the Lacey Act Amendments of 1981, 16 U.S.C. §§3372 and 3373 (1982), which proscribe the importation in interstate commerce of any fish or wildlife taken, possessed, transported, or sold in violation of state law. *Id.* §3372(a)(2)(A).[1] The indictment, which included a conspiracy count and a substantive count, alleged that defendant imported into the State of Maine live golden shiners[2] in violation of the blanket prohibition of Me. Rev. Stat. Ann. tit. 12, §7613. Defendant moved to dismiss the indictment on the ground that the statute violated the Commerce Clause. The district court accepted the magistrate's recommended decision and denied the motion. It concluded that, while the statute discriminated against interstate commerce, it served a legitimate local purpose and that less discriminatory alternatives were not available. 585 F. Supp. 393 (D. Me. 1984). Defendant then entered a conditional plea

[1]Section 3373(d) enumerates federal crimir penalties for violation of the Lacey Act Amendments.

[2]The golden shiner, whose scientific name is *Notemigonus cryseleucas,* is a warm water fish that is also known as the American roach. It is "a larger, greenish and golden minnow attaining a length and weight of 30 centimetres and 0.7 kilogram (1½ pounds), [which] is both edible and a valuable bait fish." VI The New Encyclopaedia Britannica 920 (15th ed. 1982).

of guilty and reserved his appellate rights. Fed. R. Crim. P. 11(a)(2).[3] This appeal followed.

II. *Contentions of the Parties*

The government and intervenor State of Maine concede that section 7613 discriminates facially against interstate commerce. They contend that the statute nevertheless should survive Commerce Clause scrutiny because of (1) Maine's vital interest in excluding fish parasites and exotic species and (2) the unavailability of alternative means that could promote this environmental purpose. The government argues that, in any event, whatever the legitimacy of section 7613 under the Commerce Clause, it is validated by "congressional consent."[4]

The government lists three parasites that might appear in imported bait fish and threaten Maine's indigenous wild fish population: (1) *Capillaria catastomi,* (2) *Pleistophera ovariae,* and (3) *Bothriocephalus opsalichthydis* (Asian tapeworm). It also contends that exotic fish species, which mingle with live bait fish, could enter Maine's waters and damage the native fish population as competitors or predators. According to the government, scientists have not agreed upon sampling and certification procedures that would assure disease-free warm water bait fish. Since golden shiners are extremely small fish,[5] inspection of each fish is concededly impossible.

[3]The rule provides:

> With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, he shall be allowed to withdraw his plea.

[4]Congress may "permit the states to regulate ... commerce in a manner which would otherwise not be permissible. . . ." *Southern Pacific Co.* v. *Arizona ex rel. Sullivan,* 325 U.S. 761, 769 (1945). The term "congressional consent" was used in Dowling, *Interstate Commerce and State Power—Revised Version,* 47 Colum. L. Rev. 547, 547 (1947).

At oral argument, the government abandoned its claim that the Lacey Act Amendments constitute congressional consent to state laws that otherwise violate the Commerce Clause. Maine, however, persists in this claim.

[5]The record indicates that the importation leading to the indictment comprised 158,000 fish, with approximately seventy fish to the pound.

For his part, defendant introduced evidence that the parasites and exotic species are not a serious threat and that Maine permits importation of other fish that pose analogous problems.[6] In addition, defendant argues that less burdensome regulatory alternatives are available to Maine and that section 7613 is no more than economic protectionism in the guise of environmentalism.[7] In support of the latter contention, defendant points to a statement submitted by the Maine Department of Inland Fisheries and Wildlife to the Legislature at a time that repeal of the ban on importation of bait fish was being considered.[8] In part, the statement reads:

> [W]e can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.

III. *The Commerce Clause*

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Clause exerts an impact beyond its literal language:

> Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate

[6]A summary of the parties' factual contentions appears in the district court's opinion, 585 F. Supp. at 395-98.

[7]The district court found that defendant waived the economic protectionism argument. *Id.* at 395 n.5. We disagree, given defendant's objections to the magistrate's recommended decision, which incorporated all the arguments included in his motion to dismiss.

[8]Counsel for the Department stipulated at the hearing on defendant's motion to dismiss that the statement was prepared by one of the government's witnesses, Peter Walker, a fish pathologist of the Department, and his superiors. App. Tr. 150-51. Walker testified that the statement was the official position of the Department at the time it was written. *Id.* at 62.

> interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact such laws imposing substantial burdens on such commerce. [Citations omitted.] It is equally clear that Congress "may redefine the distribution of power over interstate commerce" by "permit[ting] the states to regulate the commerce in a manner which would otherwise not be permissible."

South-Central Timber Dev., Inc. v. *Wunnicke*, ___ U.S. ___, ___, 104 S. Ct. 2237, 2240 (1984) (quoting *Southern Pacific Co.* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945)). In its role as an implied limitation on state power, the Clause is referred to, interchangeably, as the negative Commerce Clause[9] or the dormant Commerce Clause.[10]

The Supreme Court has formulated a three-part test for evaluation of state statutes under this Clause:

> [W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma*, 441 U.S. 322, 336 (1979) (invalidating statute that placed no limit on number of minnows that could be taken by licensed minnow dealers but forbade any person from leaving the state with more than three dozen minnows).

[9]*See, e.g., W.C.M. Window Co.* v. *Bernardi*, 730 F.2d 486, 493 (7th Cir. 1984); Comment, *The Negative Commerce Clause—A Strict Test for State Taxation of Foreign Commerce*, 13 N.Y.U. J. Int'l L. & Pol. 135 (1980).

[10]*See, e.g., South-Central Timber*, ___ U.S. at ___, 104 S. Ct. at 2242; Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982).

See Pike v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *Cf. Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) ("When legislating in areas of legitimate local concern, such as environmental protection and resource conservation, States are nonetheless limited by the Commerce Clause.").

When the effects on interstate commerce are more than incidental, as they are here (with the government conceding the discriminatory impact of the Maine statute), "the burden falls on the State to justify . . . [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake." *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). The court is not bound by the state's characterization of its statute but is required, instead, to examine the practical impact of the law. *Hughes*, 441 U.S. at 336. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose [citation omitted] or discriminatory effect [citation omitted]." *Bacchus Imports, Ltd.* v. *Dias*, ____ U.S. ____, ____, 104 S. Ct. 3049, 3055 (1984). If a law ostensibly designed to protect the environment is in reality economic protectionism, there is a " 'virtually *per se* rule of invalidity.' " *Clover Leaf*, 449 U.S. at 471 (quoting *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)).

Nevertheless, even a facially discriminatory statute may survive Commerce Clause scrutiny if it is a legitimate quarantine law. But a statute will not be granted such statutes merely on the basis of a legislative *ipse dixit*. Thus, in *City of Philadelphia* v. *New Jersey*, the Supreme Court invalidated a New Jersey statute barring the importation of solid or liquid waste, and distinguished that statute from valid state laws:

> But those quarantine laws banned the importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils. Those laws thus did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.

> The New Jersey statute is not such a quarantine law. There has been no claim here that the very movement of waste into or through New Jersey endangers health, or that waste must be disposed of as soon and as close to its point of generation as possible.

437 U.S. at 628-29. *See Asbell* v. *Kansas*, 209 U.S. 251 (1908) (upholding cattle inspection law); *Reid* v. *Colorado*, 187 U.S. 137 (1902) (upholding quarantine on diseased livestock). *Cf. Bowman* v. *Chicago & N. Ry.*, 125 U.S. 465, 489 (1888) (distinguishing Iowa restriction on importation of liquor from legitimate quarantine laws).

Section 7613 is subject to the same analysis as the New Jersey statute reviewed in *City of Philadelphia*. It is not limited to diseased animals; it encompasses all bait fish. It does not bar all traffic in bait fish; it focuses only on bait fish that come from other states. It does not limit its prohibition to bait fish released into the environment; it bars all importations. In short, section 7613 is not a quarantine statute. Nor, for the reasons that follow, can the statute withstand scrutiny under the three-part test of *Hughes* v. *Oklahoma*.

A. *Discrimination Against Interstate Commerce*

The government concedes that the statute discriminates against interstate commerce on its face, thus triggering "the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Hughes*, 441 U.S. at 337. *Accord Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 958 (1982).

B. *Legitimacy of Local Purpose*

On the issue of legitimate local purpose, the statement by the Department of Inland Fisheries and Wildlife, which emphasizes benefits to local business accruing from section 7613, evinces an aura of economic protectionism, which is "abhorrent to the Commerce Clause." *Hughes*, 441 U.S. at 333. Moreover, Maine's total ban on the importation of bait fish is apparently unique among the fifty states, and even Maine

accepts importations of cold water fish, subject to a certification procedure.[11] Although Maine is not necessarily required to lower its environmental standards to those of the other states, or to permit entry of warm water bait fish merely because it accepts cold water fish, the uniqueness of section 7613's ban, together with the indications of economic protectionism, cast doubt on the legitimacy of local purpose.[12]

C. *Alternative Means*

But even assuming that the statute serves a legitimate local purpose, it cannot survive the third branch of the *Hughes* test. For Maine has not carried its substantial burden of proving that no "alternative means could promote this local purpose as well without discriminating against interstate commerce." *Hughes,* 441 U.S. at 336.

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[11]Me. Rev. Stat. Ann. tit. 12, §7202 (1981), provides:

> **1. Issuance.** The commissioner may grant permits to introduce, import or transport any live freshwater fish or eggs into the State or to receive or have in possession fish or eggs so introduced, imported or transported.
>
> **2. Application.** Importers shall, when requesting a permit, provide the commissioner with the following information:
>
> **A.** The number and species to be imported;
>
> **B.** The name and address of the source; and
>
> **C.** A statement from a recognized fish pathologist, from a college or university, from a state conservation department or from the United States Fish and Wildlife Service, certifying that the fish or eggs are from sources which show no evidence of viral hemorrhagic septicemia, infectious pancreatic necrosis, infectious hematopoietic necrosis, Myxosomo cerebralis or other diseases which may threaten fish stocks within the State.

[12]Nor is it clear that Maine's statutory scheme is designed to achieve the purported goal of excluding parasites and exotic species. The testimony of two government witnesses is instructive. Peter Walker, a fish pathologist for the Maine Department of Inland Fisheries and Wildlife, indicated that little could be done to prevent fish from swimming over the New Hampshire border into Maine. App. Tr. 49-50. Additionally, Dr. W. Harry Everhart, former Chief of Fisheries for the Department, acknowledged that the state's policy of permitting importation of freshwater fish undermined the putative goals of the bait fish law. *Id.* at 79-81, 88-90.

In *Hughes,* the Court criticized a conservation scheme that chose the method most overtly discriminatory against interstate commerce. *Id.* at 337-38.[13] The same type of discrimination is present here. Thus, among states that regulate importation of bait fish, some require that shipments of imported fish have disease-free certifications,[14] while at least one state conducts its own inspections of out-of-state fish.[15]

Maine has argued that inspection at its border would be impractical (because the fish would not survive inspection) and that it cannot rely on inspections in other states by individuals not under Maine's supervision. We find it difficult to reconcile this latter contention with Maine's acceptance of such inspections in the case of cold water fish. *See supra* note 11. Furthermore, at oral argument it was suggested that Maine could send its inspectors to hatcheries in other states and require the exporter to pay for the inspection.[16] Without deciding whether such an arrangement would satisfy Commerce Clause

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[13]While the statute invalidated in *Hughes* permitted exportation of up to thirty-six minnows, Okla. Stat. tit. 29, §4-115(B)(1) (Supp. 1978), the Maine statute effects a total ban on importation. For purposes of the Commerce Clause, "[i]t does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other." *City of Philadelphia,* 437 U.S. at 628.

[14]*E.g.*, Wis. Stat. Ann. §29.535(1)(c) (West Supp. 1984).

[15]Defendant has called to the court's attention a Tennessee regulation providing for inspection of out-of-state fish, which regulation is summarized in Mississippi State University Cooperative Extension Service, *For Fish Farmers,* Sept. 20, 1983, at 6. *Cf.* Minn. Stat. Ann. §101.42(6) (West 1977) (permits required for importation of minnows); S.D. Codified Laws §41-14-30 (1977) (same); Utah Code Ann. §23-15-12 (1976) (permission from wildlife board available for importation of aquatic wildlife); Va. Code §28.1-183.2 (1979) (administrative permission available for importation of fish or shellfish).

[16]*Cf.* Cal. Fish & Game Code §6306 (West 1984) ("The expense of any examination made necessary by the provisions of this code, shall be borne by the owner of the fish, amphibia, or aquatic plants, or the person or persons importing them into this State. . . .").

requirements, we note that it would impose a far lighter burden on interstate commerce than the present absolute prohibition. *Cf. Dean Milk Co.* v. *City of Madison,* 340 U.S. 349, 354-55 (1951) ("If the City of Madison prefers to rely upon its own officials for inspection of distant milk sources, such inspection is readily open to it without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors."). Similarly, a restriction on the number and size of importations would be less restrictive than a total ban. What is more, although the size of golden shiners precludes inspection of every fish to be imported, Maine could use sampling techniques similar to those employed by the state on other fresh water fish.[17]

In sum, we cannot accept Maine's contention that nothing short of a total ban on importation will preserve the local interests at stake. Under the strict scrutiny test applicable to facially discriminatory statutes, we cannot believe that Maine has searched for and found the least discriminatory alternative. For this reason, section 7613 cannot pass the test of *Hughes* v. *Oklahoma.*

IV. *Congressional Consent*

Having found section 7613 repugnant to the Commerce Clause under the *Hughes* test, we turn to Maine's contention that the statute is nevertheless validated by congressional consent.[18] Under the doctrine of congressional consent, even statutes that discriminate egregiously against interstate commerce and foster the "economic Balkanization" that the Framers abjured, *Hughes,* 441 U.S. at 325, may be resuscitated at the will of Congress. *See South-Central Timber,* ____ U.S.

[17]Another alternative emerged in the testimony of Peter Walker, who acknowledged the possibility of raising golden shiners on bait farms set aside for that species alone. App. Tr. 60-61. If imports were limited to shiners grown on such farms, the problem of introducing exotic species into Maine waters would concededly be alleviated.

[18]At oral argument, the contention was abandoned by the government, but not by Maine. *See supra* note 4.

at ____, 104 S. Ct. at 2240.[19] The issue is what Congress has willed.

In its brief, the government points to the language and legislative history of the Lacey Act Amendments of 1981 as evidence that Congress has consented to section 7613. The statute provides in part:

> It is unlawful for any person—
>
> * * *
>
> to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
>
> > any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law. . . .

16 U.S.C. §3372(a)(2)(A) (1982).

The government brief construes the statute as conferring

[19]The rationale for congressional ability to permit state regulation or taxation that would otherwise be barred by the Commerce Clause is articulated in *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946). In sustaining, on the basis of the McCarran Act, a license tax imposed by South Carolina on premiums collected in the state by foreign insurance companies, the Court exposed the logical fallacy in the argument that Congress could not permit that which ordinarily would be barred by the Commerce Clause:

> [I]n all the variations of commerce clause theory it has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of its power. Much less has this boundary been thought to confine what Congress and the states acting together may accomplish. So to regard the matter would invert the constitutional grant into a limitation upon the very power it confers.

Id. at 422-23. Of course, it is possible that a statute thus shielded from Commerce Clause scrutiny would fall, nevertheless, under another constitutional provision whose operation cannot be forestalled by congressional consent. *See, e.g., Hicklin* v. *Orbeck,* 437 U.S. 518, 531-32 (1978) (referring to "mutually reinforcing relationship" of Privileges and Immunities Clause, U.S. Const. art. IV, §2, cl. 1, and Commerce Clause).

congressional approval on any state law restricting commerce in fish or wildlife.[20] Defendant disputes that reading and argues that the Lacey Act Amendments were intended to provide federal assistance for enforcement only of those state laws that are otherwise valid. The district court concluded that the magistrate correctly found nothing in the Lacey Act Amendments or the legislative history indicating an intent to protect state statutes from Commerce Clause scrutiny. 585 F. Supp. at 394 n.3. We agree.

The legislative history of the Lacey Act Amendments demonstrates that Congress intended to provide "a Federal tool to aid the States in enforcing their own laws concerning wildlife." S. Rep. No. 123, 97th Cong., 1st Sess. 2, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1748, 1749. *See United States* v. *Bryant,* 716 F.2d 1091, 1093 (6th Cir. 1983), *cert. denied,* ____ U.S. ____, 104 S. Ct. 1006 (1984). The Amendments were designed to strengthen the enforcement of valid state laws, in the interest of environmental protection. They do not constitute a blank check for all state laws, regardless of their validity under the Commerce Clause.

Congressional intent is demonstrated by the stated goals of cracking down on professional criminals involved in illicit fish and wildlife trade[21] and stemming the flow of diseased animals

[20]16 U.S.C. §3378(a) provides: "Nothing in this chapter shall be construed to prevent the several States or Indian tribes from making or enforcing laws or regulations not inconsistent with the provisions of this chapter." This provision has nothing to do with the question of congressional consent—and the government does not contend otherwise—since it merely "defines the extent of the federal legislation's preemptive effect on state law." *Sporhase,* 458 U.S. at 959.

[21]The first paragraph of the General Statement of the report reads as follows:

> In recent years, investigations by agents of the various agencies charged with enforcing wildlife laws have uncovered a massive illegal trade in fish and wildlife and their parts and products. Evidence indicates that much of this illegal, and highly profitable, trade is handled by well organized large volume operations run by professional criminals. The more sophisticated operations utilize "white collar" crime tactics such as multiple invoicing and other fraudulent documentation to carry out and conceal their illicit activities.

from abroad.[22]

At best, only one passage in the legislative history arguably denotes congressional consent:

> The current Black Bass Act does not prohibit interstate transportation of fish into a State that prohibits their entry. As an example, California strongly objects to shipments of live white amur carp into California from Arkansas. California has no remedy against the shipper in Arkansas, and the Federal Government cannot intervene in California's behalf under the current law. This problem is solved by the proposed legislation.

Id. at 3, *reprinted in* 1981 U.S. Code Cong. & Ad. News at 1750.

We conclude that this single paragraph, which is susceptible of differing interpretations, is insufficient, particularly in the context of a twenty-one-page report, to manifest clear congressional intent to uphold *all* state laws that discriminate against interstate commerce in fish and wildlife. "Reliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards, and 'a step to be taken cautiously.' " *New England Power Co.*

S. Rep. No. 123, 97th Cong., 1st Sess. 1, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1748, 1748.

[22]The second paragraph of the General Statement provides in part:

> The illegal wildlife trade has grim environmental consequences. It threatens the survival of many species of wildlife, particularly those which we value because of their aesthetic or commercial values. The economic consequences of this trade are also severe. It directly threatens America's agriculture and pet industries and indirectly burdens individual taxpayers. Imported wildlife carry diseases that can affect poultry, livestock, fish and pets. The most important of these diseases is exotic Newcastle disease, which is transmitted by imported birds to native birds, including poultry.

Id.

v. *New Hampshire*, 455 U.S. 331, 342 (1982) (quoting *Piper* v. *Chris-Craft Indus., Inc.*, 430 U.S. 1, 26 (1977)) (holding single statement in legislative history inadequate demonstration of congressional consent).

The Supreme Court has stated "that for a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be unmistakably clear." *South-Central Timber*, ___ U.S. at ___, 104 S. Ct. at 2242.[23] Here, an unmistakably clear design to validate state laws cannot be found where the overarching principle embodied in the legislative history is the intent to back up valid state enactments with federal enforcement power.

V. *Conclusion*

For the foregoing reasons, the judgement of the district court is reversed and remanded with direction to enter an order dismissing the indictment.

Reversed.

[23]When it has so intended, Congress has demonstrated ample ability to consent clearly to state statutes. *See Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 429-30 (1946).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1699

UNITES STATES OF AMERICA,
Appellee,
v.
ROBERT J. TAYLOR,
Defendant, Appellant.

Before
BREYER and TORRUELLA, *Circuit Judges,*
and MALETZ,* *Senior Judge.*

MEMORANDUM AND ORDER

Entered: April 10, 1985

The court has considered the petitions for rehearing submitted by the United States and by the State of Maine and has determined that the petitions should be denied. The most serious argument raised in the petitions is the contention that the court should have been bound by the findings of fact made by the district court. The answer to that argument is twofold:

*Of the United States Court of International Trade, sitting by designation.

1) The district court's finding that Maine's statute provided the least discriminatory alternative was a mixed finding of law and fact. Since this finding entails a legal conclusion, it was entirely appropriate for the court to review it carefully. *See, e.g., Bose Corp.* v. *Consumers Union of United States, Inc.*, ___ U.S. ___, ___, 104 S. Ct. 1949, 1959-60 (1984); *Pullman-Standard* v. *Swint,* 456 U.S. 273, 286 n.16 (1982); *First Nat'l Bank of Hartford, Wis.* v. *City of Hartford,* 273 U.S. 548, 552 (1927).

2) Although the Supreme Court has observed, under some circumstances, that findings of fact should not be disturbed if supported by substantial evidence, *see Container Corp. of America* v. *Franchise Tax Bd.*, ___ U.S. ___, ___, 103 S. Ct. 2933, 2946 (1983) (quoting *Norton Co.* v. *Department of Revenue,* 340 U.S. 534, 537-38 (1951)), it often must perform the same kind of factual examination that the court performed here. *See, e.g., Bacchus Imports, Ltd.* v. *Dias,* ___ U.S. ___, 104 S. Ct. 3049 (1984) (rejecting Hawaii's argument that okolehao and pineapple wine do not compete with other products sold by liquor wholesalers), *rev'g In re Bacchus Imports, Ltd.*, 65 Hawaii 566, 656 P.2d 724 (1982); *Boston Stock Exch.* v. *State Tax Comm'n,* 429 U.S. 318, 328 (1977) (rejecting Court of Appeals holding that transfer tax on securities transactions was not discriminatory), *rev'g* 37 N.Y.2d 535, 337 N.E.2d 758, 375 N.Y.S.2d 308 (1975).

Having stated that the court was free to examine carefully the factual record and to draw its own conclusions, we find the result reached by the panel inevitable. There was no dispute about the applicable legal test, which was quoted in the slip opinion at 6-7. *See Hughes* v. *Oklahoma,* 441 U.S. 322, 336 (1979). Nor was there any dispute as to the first branch of that test—the statute discriminated against interstate commerce. In applying the three-part *Hughes* test to the Maine

statute, the court found that, at a minimum, the statute failed the third part: "whether alternative means could promote [the] . . . local purposes as well without discriminating against interstate commerce."

The statute failed the "alternative means" branch of the test because, among other things:

> 1) Maine provides no protection against in-state parasites and related harms that may exist at large in-state hatcheries;
>
> 2) Maine's justifications for failure simply to impose a border inspection system seem weak in light of its use of such systems in the case of other, and far more seriously harmful, fish parasites;
>
> 3) Maine's justifications for failure to use inspection at out-of-state hatcheries (as specifically required in the analogous case of *Dean Milk Co.* v. *City of Madison,* 340 U.S. 349 (1951) is nonexistent;
>
> 4) There is at least some direct evidence in the record of economic protectionism as a motive; and
>
> 5) The statute seems ineffective to achieve its purported goal, since fish may swim into Maine over the New Hampshire border and since the former Chief of Fisheries testified that Maine's permitting the importation of freshwater fish undermined the effectiveness of the bait fish law.

We have re-examined the record in light of the rehearing petitions. Although we understand that here—as in many complex and fact-specific cases—the government may disagree with the court's reading of the evidence, we see no purpose to be served either in reading the lengthy evidentiary record yet again or in asking another group of appellate judges to do so. We therefore deny the petitions for rehearing.

By the Court:

Francis P. Scigliano
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1699

UNITES STATES,
Appellee,
v.
ROBERT J. TAYLOR,
Defendant, Appellant.

Before
CAMPBELL, *Chief Judge,*
COFFIN, BOWNES, BREYER and TORRUELLA,
Circuit Judges.

ORDER OF COURT
Entered: April 10, 1985

The panel of judges that rendered the decision in this case having denied the petitions for rehearing submitted by the United States and the State of Maine, and no judge was a member of the panel nor any judge in regular active service having requesting a vote on the suggestions for rehearing en banc submitted by the United States and the State of Maine,

It is ordered that both suggestions for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1699

UNITES STATES,
Appellee,
v.
ROBERT J. TAYLOR,
Defendant, Appellant.

Before
CAMPBELL, *Chief Judge,*
COFFIN, BOWNES, BREYER and TORRUELLA,
Circuit Judges.

CORRECTED ORDER OF COURT
Entered: April 11, 1985

The panel of judges that rendered the decision in this case having denied the petitions for rehearing submitted by the United States and the State of Maine, and their suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that both suggestions for rehearing en banc be hereby denied.

By the Court:

Francis P. Scigliano
Clerk.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA:		
	:	
vs.	:	CRIMINAL NO:
	:	83-00004-B
ROBERT J. TAYLOR,	:	
	:	
Defendant	:	

RULING ON MAGISTRATE'S
REPORT AND RECOMMENDED DECISION

CYR, *Chief Judge*

The defendant[1] has been charged in a two-count indictment[2] alleging violations of 16 U.S.C. §§3372 and 3373, also known as the Lacey Act Amendments of 1981, which make it a federal offense for any person "to import, export, transport, sell, receive, acquire or purchase in interstate . . . commerce (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law . . . of any State. . . ." 16 U.S.C. §3372(a)(2). The relevant state statute, 12 M.R.S.A. §7613, provides that "[a] person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters."

The defendant moved to dismiss the indictment on the ground that section 7613 places an impermissible burden on

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[1]Defendant, a Maine resident, is engaged in raising golden shiners for commercial sale. Tr. 144. According to his testimony, he is unable to harvest a sufficient number of golden shiners to meet public demand, especially during the winter ice fishing season when the demand for live bait fish exceeds the supply. Tr. 147.

[2]Count I alleges that the defendant conspired to bring into the State of Maine live golden shiners commonly used for bait fish. Count II charges the defendant with actually bringing the shiners into the state.

interstate commerce in violation of the Commerce Clause of the United States Constitution.

After a hearing on defendant's motion, which included extensive expert testimony, the Magistrate recommended that the motion be denied. Finding that the Lacey Act Amendments do not insulate section 7613 from constitutional attack[3] and applying the balancing test set out in *Hughes* v. *Oklahoma,* 441 U.S. 322, 336 (1979),[4] the Magistrate concluded that, although facially discriminatory, section 7613 serves a legitimate local interest and that the state had demonstrated that there are no feasible alternative means for promoting the state's interest in preserving its wild fish population short of the outright ban imposed by section 7613.

Defendant raises two objections to the Magistrate's report and recommended decision.[5] First, defendant contends that the Magistrate erred in finding that section 7613 serves a legitimate local interest. Second, defendant argues that the

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[3]The Magistrate correctly found that the Lacey Act Amendments do not incorporate all existing state laws regulating possession, transportation, or sale of fish. While the Lacey Amendments were viewed by Congress "as a Federal tool to aid the States in enforcing their own laws concerning wildlife," S. Rep. No. 97-123, 97th Cong. 1st Sess., *reprinted in* 1981 U.S. Code Cong. & Ad. News 1748, 1749 (Senate Report), there is nothing in either the statute or its legislative history which expresses the clear intent of Congress that the Lacey Act Amendments are meant to insulate state legislation from attack under the Commerce Clause. *Cf. New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 341-43 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44-49 (1980). *See also Silver* v. *Woolf,* 694 F.2d 8, 13 (2d Cir. 1982), *cert. denied,* ____ U.S. ____; 103 S. Ct. 1425 (1983).

[4]Under this test, the Court must inquire:

> (1) whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Id. at 336.

[5]The Magistrate rejected defendant's argument that section 7613 is an economic protectionist measure, and defendant has not renewed this con-

record clearly establishes the feasibility of less discriminatory alternatives which would adequately safeguard the state's purported interest.

Although a state's interest in conservation and protection of wild animals is a legitimate local purpose, similar to the state's interest in protecting the health and safety of its citizens,[6] where a state regulation facially discriminates against interstate commerce, as here, "such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of non-discriminatory alternatives." *Hughes* v. *Oklahoma,* 441 U.S. at 337.

At the hearing before the Magistrate the Government argued that section 7613 serves two important state interests: controlling the spread of disease among Maine's wild fish population, and preventing the introduction of exotic species of fish into the State of Maine. Tr. 12.

In support of its assertion that imported bait fish, especially golden shiners, pose a serious threat to the indigenous wild fish population, the state identified three particular parasites which might be found in imported bait fish. The first, capillaria catastomi, is a small round worm which embeds itself in the lining of the gut of the host fish and causes enteritis, an inflammation of the intestinal lining of the fish. Tr. 14-15. According to the fish pathologist for the Maine Department of Inland Fisheries and Wildlife (Fisheries), this particular parasite is not native to the State's wild fish population but first began to appear in the winter of 1983, probably as the

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tention. *See Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978) ["whatever (the state's) ultimate purpose, it may not be accomplished by discriminating against articles of interstate commerce from outside the state unless there is some reason, apart from their origin, to treat them differently."].

[6]The passage of the Lacey Act Amendments clearly lends support to the legitimacy of the state's interest in protecting its fish. In an effort "both to ensure that endangered species are not further threatened with extinction, and to afford management of healthy wildlife populations for hunting and other recreational purposes," the amendments were designed to encourage states "to protect a broad variety of species." Senate Report at 1749, 1750.

result of illegal fish importation. Tr. 15-16. The Fisheries expert stated that this parasite presents a debilitating disease which slows the growth of the fish and in some cases is serious enough to kill the fish. Tr. 15. This particular parasite was found to exist in low to moderate numbers in the shipment of golden shiners seized from the defendant. Tr. 16.

The defendant's expert testified that capillaria catastomi is not unique to golden shiners and that, at least according to a colleague, it is debatable whether the parasite is a true pathogen. Tr. 111-112. Defendant's expert testified that, at least in the environment of commercial bait fish hatcheries, this parasite is most commonly associated with malnutrition and that it is the malnutrition, and not the parasite, which causes the problems of stunted growth in bait fish. Tr. 118, 136. He also stated that this parasite would not affect wild fish to the degree it affects hatchery fish, because hatchery fish are generally more susceptible to disease, due to their close proximity during spawning. Tr. 137.

The second parasite, pleistophora ovariae, is a disease organism which destroys the ability of female fish to reproduce. Tr. 17. The Fisheries expert testified that in commercial hatcheries in the southeastern United States, where this organism is present, there has been an effect on the brood stock. While he was not aware of any studies confirming or denying the parasite's impact in the wild, the Fisheries expert did express the opinion that it would have a negative impact on the wild golden shiner population because the biology of the Maine golden shiner is different from its southern counterpart. Tr. 17-18. The expert also observed that golden shiners are the most intensely cultivated of all bait fish and that it is the golden shiner which is most often shipped to the northeast from the commercial hatcheries in the south.[7] *Id.* This organism has never been detected in Maine's wild fish population, but was found in some of the seized fish. Tr. 19.

[7]According to the defendant's expert there are approximately 300 golden shiner producers in the country, with 49 hatcheries in 12 states producing 65 percent of all golden shiners sold commercially. Tr. 109. In terms of its dollar volume, the bait fish industry is second only to the tropical fish business. Tr. 110.

The defendant's expert testified that pleistophora ovariae is strictly a commercial hatchery problem and that while it was possible that it could be transmitted into the wild fish population, an area he had not researched, he did not believe the organism presented any danger. Tr. 107-108, 133.

The third, and apparently most destructive, parasite, bothriocephalus opsalichthydis, more commonly referred to as the Asian tapeworm, embeds itself in the lining of the intestine and prevents the fish from digesting its food. It is often fatal to the host fish. Tr. 19-20. The Fisheries expert testified that this tapeworm has never been detected in Maine's wild fish population and was not present in defendant's shipment, though he stated that he did find it in a fish examined at a local bait store. Tr. 21-22. He also stated that, because this parasite is not host-specific, it could certainly have potentially adverse effects on the entire wild fish population. *Id.*

Reiterating his position that the Asian tapeworm, like the other parasites, does not present a serious problem, defendant's expert noted that once the tapeworm enters a fish population, and despite a certain mortality rate among the fish, there is little impact after this initial exposure. Tr. 119. At least in commercial hatcheries, defendant's expert stated that the tapeworm is apparently present only where grass carp are also present but that the presence of the carp does not automatically mean that the tapeworm will be found. Tr. 120. He also observed that the greatest danger to salmonids, i.e., salmon, trout and other cold water fish, is not pathogens transmitted by warm water bait fish but those transmitted by salmonids. Tr. 123.

Another asserted state purpose served by section 7613 is the state's interest in preventing the introduction of exotic, or nonindigenous, species into Maine.[8] The Fisheries expert

[8]The concern is that exotic species will enter the state as part of bait fish shipments. The Fisheries expert testified that bait fish are reared in surface ponds together with other fish. In addition, the bait fish are shipped to intermediate dealers who place all the fish in various holding facilities before distributing the fish to local dealers. Tr. 33-34. Both defendant's expert and the defendant testified that most commercial hatcheries use newly dug ponds in which only one kind of bait fish is raised. Tr. 124, 145-46.

testified that Maine occupies a unique position, in that it has a very limited native wild fish population. Accordingly, the introduction of exotic species would alter the existing environmental balance by increasing competition for food and habitat, as well as in other ways which cannot be accurately predicted.[9] Tr. 30, 71-74. He also testified that in the past seven years, seven new species of fish have been introduced into Maine waters, in his opinion the result of illegal smuggling. Tr. 30. When the Fisheries Department has introduced new species, it is done only after extensive research and some understanding of the effects the fish will have on the environment. Tr. 40-41.

Another expert testifying for the Government also noted that Maine is unique, especially for its landlocked salmon fishery. Tr. 68-69. He observed that, given the low fish and food productivity of Maine lakes, introduction of new species of fish would severely tax existing food supplies and upset the environmental balance. Tr. 69, 71.

In finding that the Government had demonstrated a significant local interest, the Magistrate concluded and the Court agrees, that the fact that the experts disagree on the seriousness of the parasites and the concomitant danger posed by their introduction into the state, and that it is impossible to predict the long term adverse consequences of exotic species, is not sufficient to taint the legitimacy of the state's interest in excluding them. The Magistrate correctly observed that the constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to sit idly by and wait until potentially irreversible enviromental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.

The Court is mindful that the defendant's expert testified that the disease organisms identified by the Fisheries expert,

[9]As an example, the Fisheries expert described the adverse effects which accompanied the introduction of common carp into the country in the late 19th century. The carp is apparently extremely competitive and adaptable and its introduction has resulted in the displacement of other fish. In Maine, the carp are confined to coastal areas. Tr. 26-27.

as well as other organisms associated with warm water bait fish, are not considered as serious or of the same magnitude as disease organisms found in cold water fish, which are listed as "reportable diseases." Tr. 106-107, 139. However, the record shows that even as to these "reportable diseases" in cold water fish, the scientific community is not in agreement as to what diseases should be reported and that these determinations, including the testing procedures used, are the subject of considerable scientific debate. Tr. 99, 130. Further, the defendant's expert testimony was confined largely to the effects of disease organisms in commercial hatcheries and, beyond suggesting an inferential connection, *see* Tr. at 133, he was unable to translate his research and findings into the probable effects these disease organisms might have on Maine's wild fish population. *See* Tr. at 132-136. In fact, his research has not involved, to any significant degree, the study of cold water fish, nor is he acquainted in any way with the wild fish population of Maine or the northeast. *Id.*

Given the somewhat unique characteristics associated with Maine's wild fish population, the substantial uncertainties surrounding the effects these organisms have on fish and the unpredictable consequences attending the introduction of exotic species into Maine's wild fish population, the state clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish.

The defendant contends that the outright ban on the importation of live bait fish imposed by section 7613 is overly burdensome. Defendant argues that most states regulate, rather than prohibit, the importation of live bait fish. Defendant asserts that there are several alternative and less discriminatory procedures which would adequately safeguard the state's interest, including border searches or a requirement of certification that shipments of live bait fish are disease free.[10]

In rejecting the defendant's argument the Magistrate found that the Government had demonstrated that there are no obviously workable alternatives to the outright prohibition of

[10]The defendant does not seriously dispute the impracticability of border searches. *See* Tr. at 36, 38-39, 75-77.

importation and that the expert testimony reveals, if anything, that confident predictions cannot be made as to either the significance of the risk or acceptable means to avoid it. The Magistrate reasoned that the "strictest scrutiny" standard mandated by *Hughes* v. *Oklahoma, supra,* cannot be read to preclude the state from acting where the evidence on the effectiveness of such alternatives is in doubt and where the potential disruptive impact is great. The Court agrees.

The Fisheries expert testified that there do not presently exist sampling and certification procedures for warm water bait fish. Tr. 31, 33, 38. This testimony is corroborated by another Government expert, *see* Tr. at 97-100, and by the defendant's expert witness as well, *see* Tr. 139, 140. The unavailability of such procedures is due primarily to disagreement among the scientific community. Whereas the defendant's expert testified that no sampling procedures have been devised because, unlike the pathogens identified in cold water fish, there are no pathogens of equivalent seriousness found in warm water bait fish, the Fisheries expert testified that at least three disease organisms pose a potential, albeit unpredictable, threat to Maine's wild fish population.

This disagreement is not, as the defendant suggests, fatal to the Government's case. In the same way that some states permit importation of some fish that others do not, it is entirely within Maine's regulatory authority to promulgate its own list of reportable diseases for warm water bait fish. The real problem is the absence of standardized sampling and certification procedures for bait fish. Both sides agree that it is possible to devise certification procedures, *see* Tr. at 60-61, 140, 142, but that abstract possibility does not constitute the applicable standard.[11] *See, e.g., Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell,* 424 U.S. 366, 376-78 (1976); *Dean Milk* v. *City of Madison,* 340 U.S. 349, 355 (1951). Even if the state

[11]The development of the sampling and certification procedures for salmonids involved years of research and the expenditure of considerable sums of money. *See* Tr. at 33. Even if these procedures could be used for testing bait fish it would, in all likelihood, take time for the experts to agree on standardized testing procedures in addition to the time required for them to agree on what pathogens would have to be tested for.

were to promulgate its own list of "reportable diseases" for bait fish and require disease-free certification, and assuming that the state could insist on enforcement of its standards in the source states, *see, e.g., Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell,* 424 U.S. at 379, the fact remains that testing procedures have not yet been devised.[12]

The Court finds that the Government has sufficiently demonstrated that less discriminatory methods are not presently available. An important factor, which must be considered in evaluating the availability and feasibility of alternative means of protecting the state's interest, involves the consequences to the state if its actions are disallowed. *See Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell,* 424 U.S. at 373. On this record, the lack of agreement among the experts is not sufficient to justify imposing on the State of Maine the unpredictable and potentially disruptive risks which are present here.

The Court accepts the Magistrate's recommended decision and, accordingly, the defendant's motion to dismiss is hereby *DENIED.*

SO ORDERED.

Dated at Bangor, Maine this 25th day of April, 1984.

Conrad K. Cyr
Chief Judge

[12]The same holds true if Maine were to establish its own in-state certification procedures.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA:		
	:	
Plaintiff	:	
vs.	:	CRIMINAL NO:
	:	83-00004-B
ROBERT J. TAYLOR,	:	
	:	
Defendant	:	

REPORT AND RECOMMENDED DECISION ON THE DEFENDANT'S MOTION TO DISMISS INDICTMENT AND ORDER ON MOTION TO DISCLOSE GRAND JURY PROCEEDINGS

On February 24, 1983, the defendant was named in a two-count indictment charging him with conspiracy to bring into the State of Maine live golden shiners commonly used for bait-fish (Count I), and with actually bringing the shiners into the State of Maine (Count II). The indictment is premised upon 16 U.S.C. §§ 3372-73, also known as the Lacey Act Amendments of 1981, making it a federal offense for any person "to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce (A) any fish or wildlife taken, possessed, transported, or sold in *violation of any law or regulation of any State...*" 16 U.S.C. §3372(a)(2) (emphasis supplied). The indictment specifies 12 M.R.S.A. §7613 as the state statute upon which the alleged federal offense is based. Section 7613 provides: "A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters."

On March 31, 1983,[1] the defendant moved to dismiss the indictment on the ground that 12 M.R.S.A. §7613 is unconstitutional as an impermissible regulation of interstate commerce. I recommend that the Motion to Dismiss be *DENIED.*

LACEY ACT AMENDMENTS

The Government[2] argues that no constitutional issue of interstate commerce need be addressed in this case because Congress has foreclosed any such challenge through its adoption

[1]Pursuant to direction of the First Circuit Court of Appeals in *United States* v. *Mitchell,* No. 82-1930 slip op. at 15 (1st Cir. Dec. 29, 1983), the court makes this contemporaneous statement of the reasons for extended exclusion of time between the filing of the defendant's motion to dismiss and the date of hearing on the motion, and between the date of hearing and the filing of this recommended decision.

The defendant's Motion to Dismiss was filed on March 31, 1983. Because the Motion raised a constitutional challenge to a state statute, the defendant was required by Local Rule 11(d) to notify the Clerk in order to enable the court to comply with its obligation to inform the Attorney General of Maine pursuant to 28 U.S.C.A. §2403(b). Failure to comply with Rule 11(d) resulted in delay in notifying the state Attorney General until June 16, 1983, and upon joint request of the defendant and the United States, the first scheduled hearing (June 17, 1983) on the Motion to Dismiss was converted to a pretrial conference. A rescheduled hearing (September 23, 1983) following receipt of the State of Maine's subsequent Motion to Intervene (July 5, 1983) was also converted to a pretrial conference when it appeared that insufficient time had been allowed for the taking of expert testimony. At the conference, the State's Motion to Intervene was granted and a schedule was established for exchange of expert information. The hearing was scheduled for November 9, 1983, and took place as scheduled. At the conclusion of the evidentiary hearing, at which expert testimony of a complex and scientific nature was introduced on behalf of the Government and the defendant, the parties requested an opportunity to file additional briefs and requested that the briefing schedule be delayed until preparation of the hearing transcript. The transcript was filed on January 19, 1984, the parties' original briefs were filed February 8, 1984, and the Government's reply brief was filed on February 21, 1984, in accordance with the schedule established by the court. The Motion was accordingly taken under advisement on February 21, 1984.

[2]The United States and the State of Maine made a joint presentation of evidence and argument at the hearing on the Motion to Dismiss and have filed a joint memorandum of law. I shall refer to their joint position as that of the Government.

of the Lacey Act Amendments. According to this argument, the Lacey Act Amendments incorporate into federal law all state laws regulating possession, transportation, or sale of fish. It "is indeed well settled that Congress may use its powers under the Commerce Clause to '[confer] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy,' " *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 339-40 (1982), *quoting Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 44 (1980). Accordingly, the Government argues that Congress has, through the Lacey Act Amendments, chosen to approve any restriction upon interstate commerce that the Maine statute represents. *See* Hellerstein, "Hughes v. Oklahoma: The Court, the Commerce Clause and State Control of Natural Resources," 1979 Sup. Ct. Rev. 51, 55 (1979). Although the defendant accepts the principle that Congress can permit the states to regulate commerce in a manner not otherwise permissible, he disagrees that Congress has done so here.

The statute could be read to support the position taken by the Government. It makes it a federal offense to transport in interstate commerce any fish possessed or transported "in violation of any law or regulation of any State." 16 U.S.C. 3372(a)(2).[3] Thus, the broadest reading is that it validates every state law concerning the possession or transportation of fish regardless of the impediment that particular state law otherwise raises with respect to interstate commerce. Wholesale validation of what otherwise might be unjustifiably discriminatory state statutes, however, is a strong purpose to attribute to Congress without a clear expression of such an intent. Since the statute does not address the issue directly, an examination of the legislative history is in order.

The Lacey Act Amendments of 1981 were concerned with the "grim environmental consequences" of the illegal wildlife trade which threatened the survival of many species and en-

[3]The Government has argued persuasively from the legislative history that the relevant laws are those of the state of destination for the fish as well as those of the state of its origin. *See* S. Rep. No. 97-123, 97th Cong., 1st Sess. 3, 7-8 (1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 1748, 1750, 1754-55.

tailed severe economic consequences because of the threat to agriculture and pet industries. S. Rep. No. 97-123, 97th Cong., 1st Sess. 1 (1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 1748. According to the Senate Report, the statutes amended by the Lacey Act Amendments

> are in many ways our most important wildlife laws since they affect the thousands of species subject to State and foreign laws. Enforcement of these laws is important both to ensure that endangered species are not further threatened with extinction, and to afford management of healthy wildlife populations for hunting and other recreational purposes.

Id. at 2. Such legislation was viewed by Congress "not as increasing the Federal role in managing wildlife, but as a Federal tool to aid the States in enforcing their own laws concerning wildlife." *Id.* at 2; *see also United States* v. *Bryant,* 716 F.2d 1091, 1093 (6th Cir. 1983) ("The Lacey Act assists the states in enforcing their wildlife protection laws...."). According to the Senate Report, "States and foreign governments are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of these governments." *Id.* at 3-4.

Thus, the legislative purpose to provide federal enforcement and penalties for violation of state laws that protect against the environmental and economic consequences feared by Congress is clear. The legislative record can be searched in vain, however, for any suggestion that Congress thereby intended to immunize from constitutional attack all such state statutes even if they were blatantly and unjustifiably discriminatory. Congress's purpose in enacting the Lacey Act Amendments should undoubtedly be considered in assessing challenged state legislation, but in the absence of an explicit statement in the statute or its legislative history, I conclude that the Lacey Act Amendments cannot be considered as automatically validating state legislation on the fish trade. *Cf. Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44-49 (1980). It is therefore necessary to evaluate separately the constitutionality of the Maine statute.

CONSTITUTIONALITY OF THE MAINE STATUTE

Maine prohibits importation of live fish commonly used for bait fishing in inland waters. 12 M.R.S.A. §7613. The United States Supreme Court has enumerated a three-step analytical process for assessing commerce clause challenges to such statutes:

> [W]e must inquire (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

Hughes v. *Oklahoma,* 441 U.S. 322, 336 (1979). The Government concedes that Maine's prohibition on importation of live baitfish discriminates on its face against interstate commerce. Joint Memorandum of Law of United States of America and State of Maine in Opposition to Defendant's Motion to Dismiss at pp. 4, 10. Thus, the two remaining issues are whether Maine's statute serves a legitimate local purpose and whether alternative nondiscriminatory means are available that would serve as well.

The local purpose put forward by the Government is the protection of Maine ecology against the introduction of parasites and exotic species that might be included in shipments of live baitfish. Although the defendant agrees that a state's environmental concerns are legitimate local objectives under *Hughes,* he argues that the risks of exotic species here are unsubstantiated and that the diseases singled out do not present a serious danger.[4]

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[4]The defendant has also argued that in fact the Maine statute is an economic protectionist measure rather than a conservation measure, and is therefore subject to per se invalidation under *City of Philadelphia* v. *New Jersey,* 437 U.S. 617 (1978). The only evidence for this contention is a statement entitled "Baitfish Importation: The Position of the Maine Department of Inland Fisheries and Wildlife," submitted to the 110th Legislature when

At the hearing and in its legal memorandum the Government identifies three parasites as posing a particular threat to the Maine environment and as capable of being brought into the state by the importation of live baitfish. Capillaria Catostomi is a small round worm which embeds itself in the lining of the fish gut and causes a disease which slows the growth of the fish, in some cases killing it. Tr. 14-15. According to the testimony, the parasite was not discovered in Maine until the winter of 1983, but has now begun to appear. Tr. 15-16. In the opinion of the fish pathologist for the Maine Department of Inland Fisheries and Wildlife, the parasite is being brought in on fish imported from out-of-state. Tr. 16.

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it was considering legislation to repeal the prohibition on importing live bait in early 1981. Government Exhibit 1. In a four and one-half page single-spaced statement detailing the Department's conservation concerns and the inadequacies of alternative measures the defendant singles out three sentences:

> In lieu of these facts, we can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.

These sentences appear in the context of a section of the statement discussing what can be done to resolve the problem of an insufficient supply of baitfish in Maine aside from accepting the risk of removing the outright ban on imports. In that context, the statement suggests that more can be done within Maine to increase the baitfish population and concludes with the sentences quoted. These three sentences do not convert the Maine statute into an economic protectionism measure. First, the context reveals that the statements are advanced not in direct support of the statute, but to counter the argument that inadequate bait supplies in Maine require acceptance of the environmental risks of imports. Instead, the Department argues, Maine's own bait supplies can be increased. Second, the paragraph is a statement of position taken by the Maine Department of Inland Fisheries and Wildlife while the Legislature was considering an amendment to the statute and thus does not itself represent the legislative position. Third, the Government has introduced testimony from the individual who was the chief of the Fisheries Division in the State Fish & Wildlife Department at the time of original passage of the statute that it was first enacted in response to fear of a parasite disease on smelts that were then being imported from New Hampshire into Maine. Tr. pp. 66-67.

The fish in the shipment which is the basis for the indictment against the defendant contained low to moderate numbers of this parasite. Tr. 16. Pleistophora Ovariae is an organism which destroys the ability of female fish to reproduce. Tr. 17. The state fish pathologist testified that he has never found this parasite in wild fish in Maine but that he did identify it in some of the fish in this shipment. Tr. 19. Bothriocephalus Opsalichthydis, a tapeworm, embeds itself in the lining of the intestines of the fish, prevents it from digesting its food and is fatal to baitfish such as shiners. Tr. 19-20. The state fish pathologist testified that he has never found it in wild fish in Maine, but on one occasion found it in a golden shiner purchased from a bait store. Tr. 21. It was not discovered in the examination of the shipment of fish here. Tr. 21. The defendant's expert witness has testified that none of the three named parasites is a serious threat to fish in the wild, that they are only possible hatchery problems and that even in hatcheries they can be controlled or at least tolerated by commercial fish farms. Tr. 107-108, 112-13, 118, 120-21. He also testified that fish health specialists as a whole do not consider the parasites of warm water fish a formidable enough danger to place them on a reportable disease list. Tr. 106-107.

As a second purpose of the statute, the Government advances the state's interest in preventing the introduction of exotic species into Maine. These new species, it argues, might become established in the Maine environment and cause harm to existing fish populations by preying upon them, by competing for the same food resources, or in ways that cannot even be predicted. Tr. 30, 71-74. The state fish pathologist referred to an example of this occurrence with the introduction of carp in other parts of the country, Tr. 26-27, and testified that seven new exotic fish species have been introduced into Maine within the past seven years apparently through illegal importation. Tr. 29-30. Another expert referred to the introduction of salamanders in Maine through a research project gone awry. Tr. 72. Primarily the defendant contends that this danger can be avoided by other means, a contention dealt with below. In addition, however, he argues that "the State has failed to substantiate to the slightest degree its claim that the intrusion of nonindigenous baitfish or a stray polliwog

or crustacean pose genuine harm to the environment. The state's pathologist, noting the recent introduction of several new species in Maine, admitted that the effects of these newcomers are unknown." Defendant's Memorandum of Law in Support of Motion to Dismiss at p. 10.

The fact that experts disagree on the seriousness of the parasites which Maine seeks to avoid and that it is impossible to predict the long-term effects of the introduction of an exotic species is not sufficient to taint the legitimacy of the state's purpose to exclude them. Historically, Maine's fish communities have been unique among the eastern states because of Maine's geologic history and its limited number of southern water drainages. Tr. 23-25, 68-69. The constitutional principles underlying the interstate commerce clause do not require Maine to wait until potentially irreversible environmental effects have occurred or to wait until all scientists agree concerning the baleful effects of a parasite on its wildlife before it takes steps to avoid such consequences. Maine's goal[5] of protecting its fish population from such risks is a legitimate goal despite the uncertainties of the risks.[6] If there were any previous doubt on this proposition, I conclude that Congress's passage of the Lacey Act Amendments buttresses the legitimacy of the goal.

The difficult issue in this case is the third step of *Hughes* v. *Oklahoma*'s analysis: the appropriateness of Maine's remedial response to these environmental concerns. The Government argues that the outright ban adopted by Maine is reasonable and is indeed the only feasible and sure method of avoiding the introduction of new parasites and new species. The defendant, on the other hand, contends that most states do allow importation of live baitfish and argues that less burdensome options are available such as certification that shipments are disease-free and institution of border inspection procedures. Much of the testimony at the hearing was

[5]It is also a legitimate goal even if the primary risks are to fish populations in hatcheries rather than in the wild.

[6]The specifics of the environmental risks, moreover, are destined to change over time in an area such as this. Testimony reveals that the statute was originally enacted because of a parasite on smelts then being imported from New Hampshire. Tr. 66-67.

devoted to the practicality and feasibility of these two alternatives.

The utility of disease-free certifications depends upon the effectiveness of inspections at the source of the shipment. The Government's experts testified that the nature of baitfish farming—shallow farm ponds over extended acreage sometimes with other species mixed in and with frequent transshipments to intermediate dealers and distributors—precludes certainty that a shipment is free of exotic species and disease, Tr. 33-34, 38, 73, and therefore makes certification an unacceptable alternative. The defendant's expert, however, testified that golden shiners are raised in newly dug ponds in which only specified eggs are deposited, Tr. 124, so that a certification process can be dependable.

The Government's experts testified that border inspections are unworkable. They stated that because of their small size and the large quantities in which they are shipped, baitfish are impractical to inspect for the presence of exotic species. Tr. 36.[7] Testing for parasites, moreover, requires actual destruction of the fish, Tr. 37, and a delay in the shipment of such length that the fish are likely to die in any event. Tr. 35, 75. Thus, the only sure way of precluding infestation is to destroy all the fish through the testing process. This dilemma has been resolved in the case of larger fish such as salmon and trout by agreement on sampling techniques, Tr. 31-33, and the defendant suggests similar principles could be applied here. No such standards have been accepted by the scientific community in the case of baitfish, however. This lack of standard is explained by the Government as an impediment to such an inspection procedure, and by the defendant as evidence that most authorities do not consider the parasite problem a severe one. Tr. 139.

[7]The shipment in question was 158,000 fish. Tr. 36. One expert testified that only one male and one female of an exotic species need to be included to create the problem. Tr. 36. The defendant's legal memorandum, p. 12, advances as suggestions a quota on imports and restrictions on the type of species that can be imported. No explanation is offered, however, as to how these measures would avoid the difficulties of inspection advanced by the Government. Even with quotas, the numbers of tiny fish to examine would still be monumental.

In other words, the expert testimony is divided on the effectiveness of both alternatives to an outright ban. Tr. 130. The question is the significance of this disagreement for the constitutional analysis.

The closest precedent to the question before the court is the case of *Hughes* v. *Oklahoma,* 441 U.S. 322 (1979). There the United States Supreme Court dealt with an Oklahoma statute which prohibited the exportation of minnows out of the state in order to avoid the removal of inordinate numbers of minnows from its waters. In enunciating the constitutional analysis outlined earlier in this opinion, the Supreme Court said that "such facial discrimination [against interstate commerce] invokes the strictest scrutiny of any purported legitimate local purpose and of the absence of nondiscriminatory alternatives." *Id.* at 337. The Court proceeded to find the Oklahoma statute unconstitutional despite its conservation purpose because Oklahoma had chosen a method "that most overtly discriminates against interstate commerce." *Id.* at 338. The Court supported its conclusion by identifying two obviously workable methods of avoiding the removal of inordinate numbers of minnows without discrimination, namely, limiting the number of minnows a licensed minnow dealer could take from state waters and limiting how such minnows could be disposed of within the state.

In this case, however, there are no obviously workable alternatives. Instead, the scientific debate presented to the court reveals that confident predictions cannot be made as to either the significance of the risk or acceptable means to avoid it. If applying the "strictest scrutiny" to remedial measures chosen by a state requires the state to prove to a certainty that its measures will work[8] and that others which do not hinder

[8]Indeed, with respect to Maine's current program, it is apparent from the state fish pathologist's testimony that some exotic species and diseases are already entering the state whether by breach of the law or by other means. As the defendant elicited on cross-examination, moreover, neighboring states which share common drainage do not have such stringent prohibitions as Maine and Maine is thus likely to suffer the introduction of what it fears in at least some of its watercourses. Tr. 49-59. The impediments to complete success, however, cannot be a ground for preventing a state from using its best efforts to limit the risk.

interstate commerce will not work, legislation like that of Maine cannot survive. To preclude action where the evidence is in doubt but the risks are great cannot, however, be the standard. The principle of the "strictest scrutiny" requires serious assessment of the availability of nondiscriminatory alternatives, to be sure, but a state should not be limited to such alternatives where there is serious doubt concerning their effectiveness even if its own measures are not foolproof. States cannot always act upon unanimous scientific evidence. The Lacey Act Amendments, moreover, express the congressional goal of restricting traffic in wildlife which is detrimental to the environment and the economy, and thus provide an additional element not present in *Hughes.*[9] Although their enactment should not result in automatic validation of unjustifiably discriminatory legislation, it counsels allowance of greater leeway to a state in choosing among options in this scientifically uncertain area.[10] Reading *Hughes* in light of the Lacey Act Amendments, I conclude that alternative less discriminatory measures cannot be counted upon to promote the state's environmental goals as well as the outright ban which Maine has selected.[11]

I conclude, therefore, that under the *Hughes* v. *Oklahoma* analysis Maine's ban on the importation of live baitfish, 12 M.R.S.A. §7613, is constitutional and that the federal prosectuion under 16 U.S.C. §§3372-73 is proper. Accordingly, I recommend that the Motion to Dismiss the Indictment be *DENIED.*

[9]It has also been suggested that *Hughes* was wrongly decided, given the predecessor legislation to the Lacey Act Amendments, a statute apparently not brought to the Supreme Court's attention. Hellerstein, "Hughes v. Oklahoma: The Court, the Commerce Clause, and State Control of Natural Resources," 1979 Sup. Ct. Rev. 51, 55 (1979).

[10]The fact that Maine permits the importation of certain new species of trout and salmon, Tr. 40-41, 81, does not help the defendant. There is no requirement that a state pursue the same goal as to each element of its wildlife.

[11]That other states may choose to assume environmental risks which Maine avoids does not alter this conclusion.

MOTION TO DISCLOSE GRAND JURY PROCEEDINGS

At the hearing on the defendant's Motion to Dismiss the Indictment, counsel agreed that the court should take under advisement the defendant's Motion to Disclose Grand Jury Proceedings upon the papers. Upon review of the defendant's Motion with his memorandum of law and the Government's memorandum in opposition, it is hereby *ORDERED* that the Motion be *DENIED*. The defendant has not made the showing required by Fed. R. Crim. P. (6)(e)(3)(C). *See Douglas Oil Co. of California* v. *Petrol Stops Northwest,* 441 U.S. 211, 222 (1979).

Dated at Portland, Maine, this 29th day of February, 1984.

D. BROCK HORNBY
United States Magistrate

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	:	
	:	
Appellee	:	
	:	
and	:	
	:	
STATE OF MAINE	:	
	:	
Intervenor-Appellee	:	No. 84-1699
	:	
v.	:	
	:	
ROBERT J. TAYLOR,	:	
	:	
Appellant	:	

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the State of Maine, intervenor-appellee in the above-named action, hereby appeals to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the First Circuit reversing, on January 18, 1985, the judgment of the United States District Court for the District of Maine and remanding the case with directions to dismiss the indictment and denying, on April 11, 1985, the petitions for rehearing *en banc* filed by the United States of America and the State of Maine.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Dated: May 10, 1985

CABANNE HOWARD
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
(207) 289-3661

MOTION

No. 85-62

In The
Supreme Court of the United States
October Term, 1985

STATE OF MAINE,

Appellant,

and

UNITED STATES OF AMERICA,

v.

ROBERT J. TAYLOR,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION TO DISMISS OR AFFIRM

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No. 85-62

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In The

Supreme Court of the United States

October Term, 1985

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STATE OF MAINE,

Appellant,

and

UNITED STATES OF AMERICA,

v.

ROBERT J. TAYLOR,

Appellee.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

—o—

MOTION TO DISMISS OR AFFIRM

—o—

The appellee Robert J. Taylor respectfully moves to dismiss or affirm the judgment of the United States Court of Appeals for the First Circuit in this case. Rule 16(1)(c) and (d).

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FACTS

Robert J. Taylor is a businessman who lives in Argyle, Maine, population 155. He operates an expanding live bait distribution business along with a fish farming business. He raises golden shiners for sale as baitfish. Because of growing demand for baitfish and the unpredictability of the northern climate, he has been unable to raise sufficient live bait to meet the demands of his customers. He wishes to import golden shiners to meet the demand of his customers for baitfish.

It is not surprising that Robert J. Taylor would wish to participate in the baitfish business. The baitfish industry is either the second or third largest segment of the hatchery fish producing industry. The industry is of such a magnitude that the value of the baitfish raised in 1980 was forty-four million dollars ($44,000,000), and the estimated 1982 yield was one hundred million dollars ($100,000,000). Baitfish are raised extensively in the southern states and distributed throughout the other states which allow fishing with live bait. It would appear that the appellee has chosen a promising business with a wide market and substantial demand, except that he is a native of Maine and chooses to reside there. The State wants to put him out of business.

On December 26, 1981, an employee of Robert J. Taylor was apprehended with a load of approximately 158,000 golden shiners (approximately $5,000 worth) which had been imported into the State of Maine. In February 1983 Robert J. Taylor was indicted for violation of the Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (1981), 16 USC § 3371, et seq. The Lacey Act makes it

a violation to transport fish in interstate commerce in violation of state law regulating wildlife. Maine law, Title 12 MRSA § 7613, prohibits all importation of live fish which are commonly used for bait. Robert J. Taylor has attacked the Maine Law as a violation of his rights secured by the Commerce Clause of the United States Constitution.

The course of litigation which led the Court of Appeals to hold § 7613 unconstitutional is set forth in appellant's Jurisdictional Statement, pp. 4-6.

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ARGUMENT

A. THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

The prohibition contained in Title 12 MRSA § 7613 is apparently unique among the United States. The State of Maine, alone among the states, has chosen to ban importation of baitfish, even those species which thrive within its own borders. A citizen of Maine may deal in live baitfish upon obtaining a license. Title 12 MRSA § 7171. A citizen may import live freshwater fish upon obtaining a permit from the Commissioner of Inland Fisheries and Wildlife. Title 12 MRSA § 7202. But a citizen may not import baitfish.

The State of Maine would have this Court believe that its ecology is in such danger from baitfish that this case is of substantial national interest. The answer to that contention is that no other states have any interest in the outcome of this case and the rule of law announced by the

United States Court of Appeals in this case will not have any direct effect upon their ability to enforce their own legitimate wildlife regulations. No other state has tried to ban importation of baitfish while allowing fishing with live bait within its borders. The decision in this case does not call into question the power of a state to ban importation of an unwanted species, or to enact quarantine measures to protect native fisheries from disease, or to regulate in an evenhanded fashion commerce in baitfish. The question presented is of interest only to the State of Maine and the bait dealers who wish to sell baitfish within its borders.

The prohibition on importation of baitfish will not have the intended effect proposed by the State of Maine. It is undisputed that the State of Maine shares a substantial watershed with the State of New Hampshire. It is also undisputed that the State of New Hampshire does not ban the importation of baitfish, and allows fishing with live bait. Since the State itself argues that any introduction means spread of the claimed problems, it can't seriously contend that a ban without cooperation of New Hampshire will effectively keep the problem baitfish out of Maine.[1] The mere use of baitfish in New Hampshire in the shared watershed will mean a spread under the State's contention. If there are problems with baitfish those problems will exist in Maine whether or not this Court accepts jurisdiction to hear this appeal.

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[1] The Saco and Androscoggin Rivers both arise in New Hampshire and flow through extensive areas of the State of Maine.

B. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

A comparison of the two decisions flowing from the United States District Court for the District of Maine with the decision handed down by the United States Court of Appeals for the First Circuit reveals the essential reason why the decision of the Court of Appeals should be affirmed. (Appendix A, Appendix D, Appendix E of Jurisdictional Statement).

The District Court paid great deference to the expert testimony offered by the State of Maine in support of the validity of its statute. Neither the District Court Judge nor the Magistrate critically analyzed the testimony of those experts. Each characterized their analysis as strict scrutiny, but in reality their analysis stopped with an acceptance of the testimony of the State's expert witnesses. The bottom line for both decisions was that if the State of Maine had any articulable basis for fearing ecological impact from importation of baitfish, then the Court was going to accept its argument. Such an analysis is more appropriate for the rational basis test used in Equal Protection cases and is not the appropriate standard for analysis in this case. See e.g. *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed. 2d 368 (1980).

The Court of Appeals finally applied the appropriate standard of analysis in its review of the record in this case. When a State chooses to halt the flow of commerce at its borders, courts are compelled to strictly scrutinize "any purported legitimate local purpose and the absence of nondiscriminatory alternatives." *Hughes v. Oklahoma,*

441 U.S. 322, 337, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). The Court of Appeals made no specific mention of the type of analysis done in the lower court, but its appellate analysis is substantially different than that conducted by the lower court and constituted the strict scrutiny of the factual record required by *Hughes v. Oklahoma,* 441 U.S. at 337.

The Court of Appeals did not conduct a *de novo* review within the context of *Container Corp. of America v. Franchise Tax Bd.,* — U.S. —, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) but applied a different standard through the District Court to review the facts before the court. Only if the lower court has applied the correct standard to the case is the Court of Appeals limited to a review of whether or not the judgment "was within the realm of permissible judgment." *Container Corp. of America v. Franchise Tax Bd.,* 103 S.Ct. at 2946. The Court of Appeals was not constrained by that standard of review, and was required to review the factual record under the correct standard as it did. The Appellee contends that the Court of Appeals was correct in its review and relies on the analysis of that Court as well as the reasoning set forth below.

1. 12 MRSA § 7613 Is Economic Protectionism.

The Court of Appeals has held that Title 12 MRSA § 7613 is economic protectionism. The State of Maine protests that the only evidence of an economic protectionism motion is contained in a brief section of one article prepared by the Maine Department of Inland Fisheries and Wildlife. This is, perhaps, the only record evidence on the issue, but, in any event, economic protectionism is not found just in the avowed purpose of the legislature, but in the practical impact of the legislation. *Philadelphia*

v. New Jersey, 437 U.S. 617, 624, 57 L.Ed. 2d 475, 98 S.Ct. 2531 (1978). The statute in this case has the admitted end of stopping commerce at the border and as such it operates as economic protectionism. In addition, a careful reading of the record reveals that the legitimate local purpose as it relates to introduction of disease into the State of Maine could not have been a goal of the statute. The statute was enacted in 1959, while each of the three parasite problems advanced by the State as concerns which constitute a legitimate local purpose were not identified until the 1960s and 1970s. Certainly the legislature was not concerned with unidentified parasites, and inferentially, at least, was concerned with other goals when enacting the statute.

2. A Legitimate Local Concern Is Not Served By The Least Discriminatory Means Available.

The Appellee does not contend that the State of Maine should have no concern about the importation of baitfish. The Appellee does contend that the concerns expressed by the State in the Court below are not serious concerns and they can be addressed by less restrictive regulation than a total ban on the importation of baitfish. The Court of Appeals has agreed with this contention.

The State of Maine has presented two areas of local concern which it feels justifies a total ban on the importation of baitfish. The first area of concern is the existence of parasites in baitfish, specifically *capillaria catastomi, pleistophera ovariae,* and *bothriocephalus opsalichthydis.* The state fish pathologist outlined the impact that these parasites might have on an individual fish. The biologist

expressed some further concern, but offered no testimony with hard data, about the possible impact on the fish population as a whole. Noticeably absent from the testimony of the fish pathologist was any evidence of the impact of these parasites on fish populations in other states. Strict scrutiny would lead a factfinder to the inescapable conclusion that there is no experience of detrimental impact to fish populations in other states where these parasites are known to exist. A fact finder would be buttressed in that conclusion by the evidence of the Appellee's expert witness that there is indeed no impact from these parasites in fish populations as a whole. In fact, these parasite problems are hatchery problems which can be managed around, and no impact has been demonstrated in the wild. The concern of the State of Maine about impact on wild fish populations is unfounded.

The baitfish industry has been in existence for some time. Baitfish have been distributed throughout the United States over the past three decades. During that time the three parasite problems which concern the State of Maine have been identified. Presumably, these three parasites have been introduced into many of the States which allow importation of the baitfish. Yet, no evidence of detrimental impact in wild fish populations was put forth by the State. The fish pathologist expressed concern about the policy of New Hampshire on importation of baitfish, but no one from New Hampshire, a border state, gave evidence of any detrimental impact. Indeed, the State of Maine had available a fish disease specialist from Alabama who could have offered testimony on the matter. He was not called upon by the State to do so. Without evidence of impact on fish populations as a whole, the parasite

concern of the State of Maine cannot be seen as a serious threat which must be addressed by the abrogation of the Appellee's rights protected by the Commerce Clause.

The second area of local concern presented by the State of Maine is the introduction of exotic species. The State's expert testified that he had found several new species of fish in the State. These new species were indigenous to areas from which baitfish were imported leading him to believe that they were brought in with loads of baitfish. According to the State's expert this was evidence of the likelihood of exotic species being brought in with shipments of baitfish.

The Appellee responds by directing the Court to the other facts in the record available to the factfinders and the Court of Appeals. The State's expert testified that he was not familiar with the methods of fish farming that produced the shipment of baitfish in this case. The Appellee's expert was familiar with the baitfish industry and testified that the methods used in raising golden shiners were the same as in raising *Salmonids*. The baitfish dealers could guarantee that only golden shiners were included in a shipment.

A factfinder could also find that Maine allows the importation of *Salmonids,* raised by the same aquaculture technique as golden shiners. It is not logical to think that the risk of exotic species being introduced is any greater with golden shiners than it is with *Salmonids*.

Finally, a factfinder could also consider the fact that several new species of fish had been introduced during the period of prohibition against importation of baitfish. This evidence could be taken as disproving the effective-

ness of prohibition. Under prohibition, baitfish dealers who are forced to smuggle to stay in business may take any type of fish available, while a properly regulated industry could guarantee shipments of golden shiners free from exotic species.

CONCLUSION

The question presented on this appeal is not of such substantial importance that plenary consideration is required. The Court of Appeals was clearly correct in its judgment and the appeal should either be dismissed or affirmed.

Dated at Portland, Maine this 28th day of August, 1985.

Respectfully submitted,

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APPELLEE'S

BRIEF

No. 85-62

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MAINE, APPELLANT

v.

ROBERT J. TAYLOR, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the State of Maine's statutory ban against importation into Maine of "any live fish * * * commonly used for bait fishing" (Me. Rev. Stat. Ann. tit. 12, § 7613 (1981)) is invalid under the Commerce Clause of the United States Constitution, thus necessitating dismissal of a federal indictment charging a violation of the Maine statute as assimilated by Section 3(a)(2)(A) of the Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A).

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STATE OF MAINE, APPELLANT

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A1-A14) is reported at 752 F.2d 757. The opinion of the district court (J.S. App. D1-D9) is reported at 585 F. Supp. 393. The recommended decision of the magistrate (J.S. App. E1-E12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1985. A petition for rehearing was denied on April 10, 1985, as corrected by order of April 11, 1985 (J.S. App. C1-C2). The State of Maine filed a notice of appeal to this Court on May 13, 1985 (J.S. App. F1), and the jurisdictional statement was filed on July 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). See discussion at pages 7-10, *infra*.[1]

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[1]The United States filed a protective notice of appeal to this Court on May 10, 1985. Thereafter, the Acting Solicitor General determined not to pursue the appeal, and the court of appeals granted the United States' motion to dismiss its appeal on July 16, 1985.

STATEMENT

1. A Maine statute, Me. Rev. Stat. Ann. tit. 12, § 7613 (1981), forbids importation into Maine of "any live fish * * * commonly used for bait fishing in inland waters." Section 3(a)(2)(A) of the Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A), "assimilates" Maine's statute by making it a federal crime "to import, * * * transport, sell, receive, acquire, or purchase in interstate * * * commerce * * * any fish * * * taken, possessed, transported, or sold in violation of any law * * * of any State."

The United States, an appellee in this Court (see Sup. Ct. R. 10.4), initiated this federal prosecution against appellee Robert J. Taylor, a resident of Maine who produces and sells live bait fish. On February 24, 1983, a grand jury in the District of Maine returned a two-count indictment charging that Taylor had imported, and had conspired to import, golden shiners, which are commonly used for bait fishing, from Connecticut into Maine (J.S. 4; J.S. App. D1 & n.2, E1). The federal indictment specified that Taylor's conduct, by breaching the state ban against importing live bait fish, violated the Lacey Act and also violated the federal conspiracy statute, 18 U.S.C. 371. Taylor moved to dismiss the indictment, contending that the State's import ban placed an impermissible burden on interstate commerce in violation of the Commerce Clause. J.S. 4; J.S. App. D1-D2. Thereafter, pursuant to 28 U.S.C. 2403(b), the district court allowed the State of Maine, the appellant here, to intervene in support of its statute's constitutionality.

2. A hearing on Taylor's motion to dismiss was held before a magistrate. The key issues were whether the exclusion of out-of-state bait fish served a legitimate local purpose, unrelated to economic protectionism, and whether less restrictive methods short of a complete ban could accomplish that same purpose. Three scientific experts testified for the prosecution, and one scientific expert testified

for the defense. The testimony of the experts for the prosecution demonstrated that Maine's small and unique wild fish population, including its own indigenous golden shiners, would be placed at risk by three types of parasites prevalent in bait fish found outside of Maine;[2] two such parasites were found in the out-of-state golden shiners comprising Taylor's confiscated shipment (J.S. App. D4). The prosecution also produced evidence demonstrating the adverse impact that exotic species, *i.e.*, non-native species that could be unknowingly imported through co-mingling with shipments of live bait fish, could have on Maine's ecology. Specifically, the experts cited the effect of competition from exotic species on Maine's unique landlocked salmon industry and its limited food resources and habitat for native fisheries. Tr. 71.

The prosecution experts also testified that there is currently no scientifically accepted procedure to inspect incoming shipments of bait fish for disease organisms or for co-mingled exotic species. The minute size of the bait fish (90 specimens per pound) prevents inspection of each fish in a shipment; indeed, a single shipment may contain hundreds of thousands of fish. Even apart from the problem of size, the bait fish could not survive the ordeal of inspection:

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[2]The three parasites, prevalent in bait fish from the southeastern United States, are *Capillaria catastomi*, a small round worm that can kill the fish, *Pleistophera ovariae*, a disease organism that destroys the ability of a female fish to reproduce, and *Bothriocephalus opsalichthydis*, an Asian tapeworm that can kill the fish (J.S. App. A3, D3-D5).

Taylor's expert opined that these and other organisms associated with warm-water bait fish are not considered as serious as disease organisms found in cold-water fish. As the district court noted (J.S. App. D7), however, the opinion of Taylor's expert was based on studies of hatchery fish, not wild fish (the focus of Maine's concern), nor did it involve, "to any significant degree," studies of cold-water fish. The district court also found that Taylor's expert was unacquainted "with the wild fish population of Maine or the northeast" (*ibid.*).

testing for parasite infestation entails killing the tested fish. The evidence additionally showed that no scientifically accepted sampling procedures, involving the selection of a representative number of fish in a shipment for testing, currently exists. Similarly, a disease-free certification program at the out-of-state point of origin would be equally unworkable, because the same unvalidated testing and sampling procedures would have to be used. J.S. App. D8-D9, E9; Tr. 94-95.

The district court accepted the magistrate's report and recommendation to deny Taylor's motion to dismiss and issued an opinion upholding the constitutionality of the Maine statute (J.S. App. D1-D9). The district court held that, although the Maine statute was facially discriminatory (as Maine and the United States had always conceded), it still met the requirements of *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979).[3] The court reasoned that the statute was a permissible burden on interstate commerce because (1) the United States and the State of Maine demonstrated a legitimate and substantial purpose in prohibiting the importation of live bait fish,[4] and (2) the expert evidence presented

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[3]As the Court noted in *Hughes*, 441 U.S. at 336, the test to be applied to state statutes alleged to violate the Commerce Clause is:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect; (2) whether the statute serves a legitimate local purpose; and, if so, (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

See also *Philadelphia* v. *New Jersey*, 4[illegible] U.S. 617, 624 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Once a statute has been determined to be discriminatory, the burden is on the state to justify the local benefits and the lack of less discriminatory alternatives. *Hughes*, 441 U.S. at 336.

[4]This Court has already recognized a state's interest in preserving its ecological balance as a legitimate local purpose in *Hughes*, wherein the Court acknowledged that Oklahoma's interest in preserving the ecological balance in its waters by restricting the removal of large numbers of minnows might well qualify as a legitimate local purpose. The Court characterized state interests in conservation and protection of wild animals as similar to the interest in protecting the health and safety of a state's citizens. *Hughes*, 441 U.S. at 337.

by the government demonstrated the lack of less discriminatory alternatives (J.S. App. D7-D9).[5] After his motion to dismiss was denied, Taylor entered a conditional plea of guilty to the two-count indictment, and the district court fined Taylor $3,000 on each count.

3. Holding that the Maine statute violates the Commerce Clause, the court of appeals reversed and remanded the case with directions to the district court to enter an order dismissing the indictment (J.S. App. A1-A14). Although it did not rest its decision on this ground, the court first questioned the legitimacy of the local purpose and Maine's characterization of its statute as a wildlife protection law, suggesting that the State's real purpose was economic protection ism (*id.* at A7-A8).[6] Even assuming that the statute

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[5]The district rejected Maine's alternative argument that the Lacey Act Amendments automatically validate state laws enacted for the protection or conservation of wildlife. The court agreed with the magistrate's conclusion that the legislative history of the Lacey Act Amendments did not demonstrate a clear and express congressional intent to insulate such state legislation from attack under the Commerce Clause. J.S. App. D2 n.3, E11.

[6]To support its view that the legitimacy of Maine's local purpose was in doubt, the court of appeals relied on a one-line statement prepared by one of Maine's experts in 1981 in connection with a proposed repeal of the prohibition on the importation of live bait fish. The statement (J.S. App. A4) suggested that more could be done to promote a local bait fishery, and the court of appeals interpreted it as evidence of economic protectionism. However, the court of appeals quoted the statement out of context. The magistrate, on the other hand, examined the entire document of which the statement was but a minor part and concluded that, in context, the statement was made to "counter the argument that inadequate bait supplies in Maine require[d] acceptance of the environmental risks of imports." *Id.* at E5-E6 n.4. In addition, expert testimony at the hearing before the magistrate revealed that Maine's statute was originally enacted in response to the State's fear of parasite disease in smelts that were being imported from New Hampshire (*id.* at E6).

serves a legitimate local purpose, however, the court held that Maine did not meet its burden of proving the lack of less discriminatory alternatives (*id.* at A8-A10). The court also rejected Maine's contention that the state statute was validated by congressional consent as evidenced by passage of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 *et seq.* (J.S. App. A10-A14).

DISCUSSION

We agree with Maine (J.S. 7-12) that the court of appeals has invalidated a state statute that meets the constitutional requirements articulated by this Court in *Hughes*. Because Maine and the United States conceded that the statute was facially discriminatory, it was incumbent upon the State to demonstrate a legitimate local purpose and the lack of less discriminatory alternatives. See note 3, *supra*. Although the United States generally opposes absolute bans on the flow of interstate commerce, we believe that substantial evidence supports the district court's finding that the statutory prohibition at issue is the only alternative available to the State to protect its fisheries. We also agree with Maine that the court of appeals was able to reach a contrary conclusion only by disregarding the overwhelming scientific evidence in the record and substituting in its stead wholly unsupported speculation about available alternatives (see J.S. App. A9-A10).

On the other hand, we agree with appellee Taylor (Mot. to Dis. or Aff. 3-4) that the validity of Maine's statute does not present any question of overriding national significance. Indeed, it is for that reason that the United States did not pursue its own appeal in this case (see note 1, *supra*). Were this case before the Court on petition for a writ of certiorari, therefore, we would take the position that it does not satisfy the Court's standards for discretionary review. Because Maine invokes the Court's appellate jurisdiction, however, we are of the view that the Court should note probable jurisdiction. Moreover, we agree with Maine that

the case can be resolved by summary disposition in light of the court of appeals' clear error in undertaking de novo review of the district court's findings of fact.

Because our position in this case turns on the circumstance that Maine has invoked the Court's appellate jurisdiction, we briefly discuss the jurisdictional basis for Maine's appeal to this Court before addressing the merits of the case.

1. a. Maine invokes the appellate jurisdiction of this Court under 28 U.S.C. 1254(2). That section provides as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * * * *
>
> By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

The plain language of this section clearly encompasses this case, in which Maine seeks appellate review of the court of appeals' judgment (J.S. App. A2) that Me. Rev. Stat. Ann. tit. 12, § 7613 (1981), violates the Commerce Clause. We note, however, that Section 1254(2), which has seldom been construed, is somewhat unique among the statutes conferring appellate jurisdiction on this Court. For example, the other statutes that invest this Court with appellate jurisidiction to review the judgments of lower federal courts (28 U.S.C. 1252 and 1253) are limited, by their terms, to "civil actions." Thus, one leading treatise has stated the general rule that, ever since the Criminal Appeals Act, 18 U.S.C. 3731, was revised in 1970, this Court's jurisdiction in

federal criminal cases "has been confined to review by certiorari of the decisions of the courts of appeals." R. Stern & E. Gressman, *Supreme Court Practice* § 2.11, at 82 (5th ed. 1978). In contrast to civil cases involving the constitutionality of a federal statute, the authors observe that this limitation holds true even if the "dismissal of an indictment or information is premised on the invalidity or unconstitutionality of the federal statute upon which the indictment or information is based." *Id.* at 81 (footnote omitted).

This case is unique, however, and does not seem to fit within the general rule. Although the case is a federal criminal prosecution, the only issue before this Court is the constitutionality of a state statute. Undoubtedly, Congress did not contemplate the unusual situation here presented, in which the validity of a federal indictment turns on the constitutionality of a state statute. Accordingly, the consideration given by Congress to the proper mode of review in federal criminal cases involving the constitutionality of federal statutes (see *Supreme Court Practice, supra*, at 79-82) would seem to have no applicability to this case. In these circumstances, the Court should be guided by the plain language of Section 1254(2), which does not limit jurisdiction to "civil actions." Notwithstanding the general rule that statutes authorizing appeals to this Court are to be strictly construed (see, *e.g., Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 246-247 (1984), we can see no occasion for reading words of limitation (*i.e.*, "civil actions") into Section 1254(2) that are conspicuously absent from the statute.[7]

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[7]Another anomaly to be noted here is that neither the Rules of this Court nor the United States Code specify any time limit for the filing of a notice of appeal in a criminal case invoking jurisdiction under Section 1254(2). See 28 U.S.C. 2101. Again, this fact suggests simply that Congress did not contemplate the situation presented by this case; it does not, in our view, furnish grounds for concluding that appellate

b. One other jurisdictional peculiarity is presented by this case, and that is Maine's standing to pursue an appeal in a federal criminal prosecution that the United States has determined not to appeal in its own right. It seems clear that if a reversal of the decision below would necessitate further action on remand, such as a retrial, Maine could not take over the role of the prosecution and proceed in the absence of the United States. In this case, however, appellee Taylor entered a conditional guilty plea, the only condition being the reservation of his challenge to the constitutionality of the Maine statute. Accordingly, reversal of the decision below would result in automatic reinstatement of the indictment and Taylor's conviction. Only if the United States were to announce that it would affirmatively seek to dismiss the indictment even in the event that Maine prevailed in this Court would Maine's standing be defeated.[8] But the United States expressly disavows any such intention, and we accordingly believe that Maine is entitled to maintain this appeal even though the United States has determined not to pursue its own appeal. Cf. *Director* v. *Perini North River Associates*, 459 U.S. 297, 302-305 (1983) (presence of injured employee as a party respondent in this Court ensures necessary adversity for Article III purposes, even if Director's standing to petition for a writ of certiorari is in doubt). Here, as in *Perini*, the presence of the United States, even in the capacity of an appellee supporting the

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jurisdiction is lacking. In any event, Maine filed its notice of appeal within 30 days (exclusive of a final weekend) of the court of appeals' denial of rehearing. Since there is no category of cases requiring the filing of a notice of appeal in less than 30 days, Maine's notice should be deemed timely.

[8]Cf. *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978) ("There is * * * a difference between permitting the United States to play an active role during the pendency of private litigation, and permitting it to go forward with the litigation in its own right after the private parties have composed their differences.").

appellant, satisfies the requirement that there be a live controversy before this Court.

2. a. Assuming that the Court agrees with us on the foregoing points, we suggest that probable jurisdiction should be noted and the judgment of the court of appeals summarily reversed for failure to apply the correct standard of review. In *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 176 (1983) (quoting *Norton Co.* v. *Dep't of Revenue*, 340 U.S. 534, 538 (1951) (emphasis added)), the Court stated:

> "[I]n constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, *but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.*"

Similarly, the First Circuit, as an appellate court, should not have reexamined the findings of the district court regarding the lack of less discriminatory alternatives, because substantial evidence was presented at the trial level (a court of first instance) to demonstrate that the Maine statute satisfies the *Hughes* test. In essence, the court of appeals reevaluated the credibility of the three prosecution experts and the scientific evidence and reached its own "scientific" conclusions that are not supported by the evidence and are not explained in the court's opinion. Only by disregarding the standard of review as to findings of fact supported by substantial evidence was the court of appeals able to reach the legal conclusion that Maine's statute is unconstitutional.[9]

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[9]The court of appeals stated in its memorandum and order denying rehearing that the question whether Maine's statute meets the requirements of the *Hughes* test as to the absence of less discriminatory alternatives is a mixed question of law and fact (J.S. App. B2). The court concluded that it therefore "was free to examine carefully the factual record and to draw its own conclusions" (*ibid.*). In support of this proposition, the court cited two cases, *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984) (rejecting Hawaii's argument that okolehao and pineapple wine do not compete with other products sold by liquor wholesalers), and *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977) (rejecting state court's holding that transfer tax in securities transactions was not discriminatory). These two cases, however, are distinguishable from the instant case in that the Court in *Bacchus* and *Boston Stock Exchange* reevaluated the legislative motive for enacting the challenged laws, whereas the court of appeals here reevaluated overwhelming scientific evidence produced at trial concerning the lack of less discriminatory alternatives. Although the court expressed doubt about the legitimacy of Maine's local purpose and the legislative motive (J.S. App. A7-A8), it did not rest its decision on that basis. Instead, it was only the rejection of the scientific evidence regarding alternatives that enabled the court of appeals to conclude that less discriminatory alternatives exist.

Specifically, to support its conclusion that less discriminatory alternatives exist, the court reasoned that, because Maine has established inspection and certification procedures for freshwater fish (trout and salmon or eggs), the same procedures could be adopted for live bait fish (J.S. App. A8-A9). But the court was comparing apples and oranges: Maine's evidence demonstrated that, unlike trout and salmon or eggs, out-of-state bait fish are not grown in controlled circumstances (J.S. App. E9). Thus, disease-free certificates for live bait fish are an unworkable alternative.

Similarly, the court of appeals erred in supposing (J.S. App. A9) that inspection procedures offer a feasible alternative. The State's evidence demonstrated that there are currently no scientifically accepted inspection procedures for live bait fish. The court of appeals was not free to disregard this evidence and to substitute instead its own assumption that "Maine has [not] searched for and found the least discriminatory alternative" (*id.* at A10). The court's doubts are no substitute for the concrete evidence and findings of fact compiled in the district court.

This Court's recent decision in *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), rendered after the court of appeals' decision in this case, reaffirms the importance of strict adherence by reviewing courts to the "clearly erroneous" rule. In these circumstances, we suggest that it would be appropriate to afford the court of appeals an opportunity to reconsider its decision in light of *Bessemer City*. Accordingly, we recommend summary reversal with instructions to reconsider the case under the clearly erroneous rule.

b. We note also that the court of appeals did not sufficiently consider the serious consequences to Maine's ecology of invalidating the challenged statute. Indeed, the court utterly failed to consider the significant risk and ultimate consequences to Maine if it is not allowed to regulate the importation of live bait fish in the "questioned" manner. As this Court noted in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976) (citation omitted), if a state demonstrates a substantial interest (as Maine has — the protection of its environment and ecology), a further inquiry is necessary to determine whether:

> adequate and less burdensome alternatives exist * * * since any " 'realistic' judgment" whether a given state action "unreasonably" trespasses upon national interests must, of course, consider the "consequences to the state if its action were disallowed."

Because the court of appeals rejected the scientific evidence presented by Maine's experts, the court failed to give adequate consideration to the significant risk to Maine if its statute cannot be enforced. Maine provided compelling evidence demonstrating the statute's legitimate purpose as the elimination of that risk, *i.e.*, diseased fish and exotic fish that would seriously harm Maine's aquatic environment. On remand, the court of appeals should be required to give appropriate weight to this factor. The State should not be

required to bear the inordinate risk that could result from the importation of live bait fish when the overwhelming scientific evidence amply demonstrated the reasons for the State's fears.[10]

CONCLUSION

Probable jurisdiction should be noted and the case remanded to the court of appeals for reconsideration in light of the proper standard of review.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ANNE S. ALMY
DIRK D. SNEL
MARGARET A. HILL
Attorneys

OCTOBER 1985

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[10]Although we support Maine's principal argument and its request for summary disposition, we do not agree with Maine's alternative argument (J.S. 12-13) that the invalidation of Maine's statute "flies directly in the face of [the] * * * Lacey Act Amendments of 1981" (J.S. 12). Rather, we agree with the court of appeals (J.S. App. A13) that the Lacey Act Amendments, although evincing congressional intent to strengthen the enforcement of valid state laws enacted for the protection of wildlife, cannot be interpreted as "clear congressional intent to uphold all state laws that discriminate against interstate commerce in fish and wildlife." See, *e.g.*, *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 7-10. Moreover, Maine's contrary argument is, in our submission, so clearly at odds with prior decisions of this Court that it should be summarily rejected. See, *e.g.*, *South-Central, supra; Sporhase* v. *Nebraska ex rel Douglas*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

JOINT

APPENDIX

No. 85-62

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF MAINE
Appellant

v.

ROBERT J. TAYLOR, ET AL.
Appellees

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED July 9, 1985
JURISDICTION POSTPONED November 4, 1985

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IN THE
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TABLE OF CONTENTS

NOTE: All opinions and orders of the lower courts in this case appear in full in the Jurisdictional Statement

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	Crim. No. 83-00004 P
v.	)	(18 U.S.C. §§ 371,2;
	)	16 U.S.C. §§ 3372(a)(2)
ROBERT J. TAYLOR	)	(A) and 3373(d)(1)(B)

DOCKET ENTRIES

Date	Doc. No.	Proceedings
1983		
Feb. 24		Indictment filed.
Feb. 25		Matter scheduled for arraignment before Mag. Brownell in Bangor for Tuesday, March 1, 1983 at 9:30 a.m.
Mar. 1		Def. arraigned and entered plea of Not Guilty; accepted. Matter continued for pretrial conference and trial. Bail set in the amount of $5,000 unsecured bond.
Mar. 1		Appearance Bond ($5,000), filed.

Mar. 1		Order Requiring Pretrial Conferences, Discovert and Inspection, filed and delivered in hand to counsel.
Mar. 9		APPEARNCE of Atty Eggert for Deft.
Mar. 9		Def. MOTION for Ext of Time to File PTMotions MTN GRANTED /s/ C. K. Cyr, USDJ 3/9/83 PTMtns due 3/31/83
Mar. 9		Affidavit of Paul Eggert
Mar. 31	3	MOTION to Dismiss by Deft w/MEMO In Spt 4/25/84 motion denied /s/ Cyr, J. See Order below.
Mar. 31	4	MOTION For Early Disclosure of Jencks Act Mat. w/MEMO in Spt
Mar. 31	5	MOTION to Disclose Grand Jury Proceedings w/MEMO in Spt
Apr. 4		Govt MOTION for Ext of Time to Respond to Defts Mtn/Dismiss 4/4/83 w/out object mtn grtd /s/ Cyr, J. (To 4/20/83)
Apr. 8		Govt MEMO in response to deft's mtn for

	disclosure of grand jury proceedings and for early disclosure of Jenks Act material
Apr. 20	Govt MEMO in Oppos to Mtn/Dismiss
June 2	p/t conf. scheduled before Hornby, Mag., for Friday, June 17, 1983, at 11:30 a.m. (counsel notified)
June 17	p/t conference had.
June 21	REPORT of hearing on Motions and Pretrial Conference, Hornby, Mag., 6/17/83, filed. Evidentiary hearing to be scheduled ater Atty Gen. informs Court whether he will enter appearance. At same hearing, Motion to Disclose Grand Jury Proceedings can be argued. (copies to counsel)
July 5	MOTION to Intervene by St. of Me., filed. 9/27/83: MOTION GRANTED, Mag. Hornby se Report of Conf. dated 9/27/83

Sept. 1	Evidentiary hearing. Motion to dismiss and motion to disclose Grand Jury proceedings scheduled bef. Mag Hornby for 1:00 p.m. on 9/23/83 in Portland, counsel notified.
Sept. 7	Evidentiary hearing scheduled for Fri., Sept. 23, 1983 before M. Hornby cancelled. P/T Conf. scheduled for Fri., Sept. 23, 1983 at 4:00 p.m. before M. Hornby. Counsel notified.
Sept. 27	REPORT of Conf. of Counsel held before Mag. Hornby on 9/23/83. Ordered: State of Maine's Motion to Intervene is Granted, by 10/14/83 counsel shall exchange Rule 26 information; by 10/28/83 counsel to file a stipulation concerning witnesses, evidentiary hearing scheduled for Nov. 9, 1983 at 9:30 am. (copies to counsel)
Nov. 9	Evidentiary hearing had.

1984

Jan. 19	TRANSCRIPT of hearing of def's mtn to dimiss Indictment, filed.
Feb. 8	Def's MEMORANDUM in support of Mtn to Dismiss, filed.
Feb. 8	Joint MEMORANDUM of Law of U.S.A. & State of Maine in opposition to def's mtn to dismiss, filed.
Feb. 21	Joint Reply MEMORANDUM of U.s.a. and State of Maine, filed.
Feb. 29	REPORT & RECOMMENDED Decision on Deft's Motion to Dismiss Indictment & Order on Motion to Disclose Grand Jury Proceedings /s/ D. B. Hornby, US Mag. cc:consl (DOE: 3/2/84)
Mar. 12	Deft. OBJECTION to Mag. Rec. Decision
Mar. 21	GOVT REPLY to defts Object to Mag Rec. Dec.
April 25	RULING on Magistrate's Report and Recommended Decision /s/Cyr, J. cc: cnsl. Mtn. dismiss denied.

May 1	FPTConf sched 5/14/84 10:30 a.m. bf Cyr, J. in Bgr.
May 14	FPTConf. had bf Cyr. J. Briefs due 5/29/84; jury instr 5/30
May 16	REPORT of FPTConf /s/ Cyr. J. (EOD 5/17/84) cc: cnsl
May 23	TRIAL cont'd. Deft to execute waiver for PSI Report 5/29/84; then notify for sched change of plea
May 29	Deft's MOTION to Continue Trial. Mtn/GRANTED (see Order below)
May 29	ORDER pursuant to Speedy Trial Act /s/ C. K. Cyr. Mtn/Continue Trial GRANTED.
June 6	Change/plea SENT sched 6/26/84 9:00 am bf Cyr. J. in Bgr
June 26	RESERVATION of Appellate Rights Pursuant to Rule 11(a)(2), F.R. Crim.P.
June 26	Def. withdrew plea of Not Guilty previously

	entered and entered plea of Guilty; accepted. Def. sentenced to pay fine of $3,000 on Count I and a fine of $3,000 on Count II.
June 26	JUDGMENT of Imposition of Fine Order /s/ C.K. Cyr, USDJ
July 6	Deft NOTICE of Appeal - filing fee pd
July 6	Record forwarded to Court of Appeals
Nov. 8	REQUEST for Execution by the Clerk. 10/19/84: Execution issued and delivered to U. S. Marshal for service.
Apr. 22	MANDATE - Jdmt of Dist Ct reversed - indictment to be dismissed /s/ Francis P. Scigliano
Apr. 24	ORDER dismissing indictment /s/ C.K. Cyr, USDJ.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	Crim. No. 83-00004 P
v.	)	(18 U.S.C. §§ 371, 2;
	)	16 U.S.C. §§ 3372(a)(2)(A)
ROBERT J. TAYLOR	)	and 3373(d)(1)(B)

INDICTMENT

The Grand Jury charges:

Count I

Beginning on or about December 1, 1981, and continuing up to and including the date of this indictment, in the District of Maine and elsewhere, the defendant

ROBERT J. TAYLOR

unlawfully, knowingly and willfully did combine, conspire, confederate and agree together with Craig C. Poole, an unindicted

co-conspirator, and with others unknown to the Grand Jury, to knowingly import, transport, sell, receive, acquire and purchase in interstate commerce fish and wildlife with market value in excess of $350.00, that would be and were possessed, transported and sold in violation of the law of the State of Maine, to wit 12 M.R.S.A. § 7613, in that there would be and were imported into the State of Maine live golden shiners (notimigonus chrysoleucas), which are commonly used for bait fishing in inland waters.

In violation of Title 16, United States Code, Sections 3372(a)(2)(A) and 3373(d)(1)(B).

It was a part of said conspiracy that a truck would be rented and that Craig C. Poole would drive that truck from Bangor, Maine to Windsor, Connecticut and wait

overnight for a delivery of live golden shiners in a motel parking lot. It was further a part of said conspiracy that Craig C. Poole would then drive the truck loaded with live golden shiners back to Bangor, Maine for delivery to Robert J. Taylor's bait fish establishment for eventual sale to fishermen in Maine. It was further a part of said conspiracy that Robert J. Taylor would pay Craig C. Poole $200 to drive the truck from Maine to Connecticut and back again to Maine.

Overt Acts

In furtherance of the said conspiracy and to effect the objects thereof, the following overt acts were committed:

1. On or about December 24, 1981 in Bangor, Maine Robert J. Taylor had a conversation with Craig C. Poole.

2. On or about December 25, 1981 Craig C. Poole drove a truck from Bangor, Maine to Windsor, Connecticut.

3. On or about December 26, 1981 Craig C. Poole drove a truck from Windsor, Connecticut to Saco, Maine.

All in violation of Title 18, United States Code, Section 371.

Count II

On or about December 26, 1981 the defendant, Robert J. Taylor did knowingly import, transport, receive, acquire and purchase in interstate commerce, from Connecticut to Maine, fish and wildlife with a market value in excess of $350.00, that were knowingly possessed and transported in violation of the law of the State of Maine, to wit 12 M.R.S.A. § 7613, in that the defendant knowingly imported into the State of Maine live golden shiners

(notimigonus chrysoleucas), which are commonly used for bait fishing in inland waters;

In violation of Title 16, United State Code, Sections 3372(a)(2)(A) and 3373(d)(1)(B) and Title 18, United States Code, Section 2.

A TRUE BILL,

_____
Foreperson

s/ Richard Cohen
United States Attorney
Date: 2/24/83

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
v.	)	CRIM. NO. 83-0000 B
ROBERT J. TAYLOR	)	

MOTION TO DISMISS

The Defendant moves that the Indictment be dismissed on the following grounds:

1. Title 12 M.R.S.A. § 7613, upon which the crime alleged in the Indictment rests is unconstitutional in that it is an impermissible of regulation of interstate commerce.

Dated at Portland, Maine, this 30th day of March, 1983.

DANIEL G. LILLEY LAW
OFFICES P.A.

s/ E. Paul Eggert
E. Paul Eggert, Esquire
Attorney for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	Crim. No. 83-00004 P
v.	)	(18 U.S.C. §§ 371, 2;
	)	16 U.S.C. §§ 3372(a)(2)(A)
ROBERT J. TAYLOR	)	and 3373(d)(1)(B)

MOTION TO INTERVENE

The State of Maine, acting by and through its Attorney General, moves the Court, pursuant to 28 U.S.C. § 2403(b), to intervene in the above-captioned case for the purpose of defending, by the presentation of evidence and/or argument, the constitutionality of 12 M.R.S.A. § 7613, which has been drawn into question by the defendant by means of a Motion to Dismiss.

Date: June 30, 1983

JAMES E. TIERNEY
Attorney General

s/ Cabanne Howard
CABANNE HOWARD
Assistant Attorney General
State House Station #6
Augusta, Maine 04333
Tel: (207) 289-3661

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, Plaintiff	)	
v.	)	Criminal No. 83-00004 B
ROBERT J. TAYLOR, Defendant	)	

REPORT OF CONFERENCE OF COUNSEL

Held at Portland, Maine, on Friday, September 23, 1983, at 4:00 p.m.

Presiding: Honorable D. Brock Hornby, United States Magistrate

Appearances: For Government: F. Mark Terison, AUSA
For Defendant: Paul E. Eggert, Esq.

Without objection, the State of Maine's Motion to Intervene is GRANTED.

Counsel exchanged the names of their witnesses for the evidentiary hearing. By October 3, 1983, counsel shall exchange

Fed. R. Civ. P. 26(b)(4)(A)(i) information and identification of all documents which they expect to introduce. By October 28, 1983, counsel shall file with the court a stipulation concerning the witnesses, their qualifications as experts, any exhibits to be introduced, note any objections to the qualifications of experts or testimony to be presented, and briefly indicate the basis for the same. The evidentiary hearing is scheduled for November 9, 1983, at 9:30 a.m. Counsel shall meet in chambers with the court at 9 a.m. Upon review of the stipulation filed October 28, 1983, the court will notify counsel if any further conference is required.

CERTIFICATE

A. This report fairly reflects the actions taken at the Pretrial Conference and shall control the

subsequent course of the action.

B. The Clerk shall submit forthwith copies of this report to counsel in the case.

C. Counsel shall submit any objections to this report to the Clerk of this Court within five days from the date of receipt of a copy hereof.

DATED at Portland, Maine this 26th day of September, 1983.

s/D. Brock Hornby
D. Brock Hornby
United States Magistrate

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA, Plaintiff	CRIMINAL DOCKET NO. 83-4 B
v.	
ROBERT J. TAYLOR, Defendant	

TRANSCRIPT OF HEARING of Defendant's Motion to Dismiss the indictment heard before Honorable Brock Hornby on November 9, 1983 at the United States District Courthouse, Portland, Maine.

[3]

(Proceedings had in open court at 9:30 a.m.)

THE COURT: Good morning again, counsel.

(All counsel responded "Good morning".)

THE COURT: This is the case of United States versus Robert J. Taylor, Criminal Number 83-4. This case is this morning on an evidentiary hearing on the hearing on the defendant's Motion to Dismiss the indictment.

Could I have counsel identify themselves for the record, please?

MR. TERRISON: Appearing for the United States of America, your Honor, F. Mark Terrison Assistant United States Attorney.

MR. HOWARD: Appearing for the intervener State of Maine, Cab Howard Assistant Attorney General and Dennis Levandoski attorney for the Maine Department of Inland Fisheries and Wildlife.

MR. EGGERT: Appearing for the defendant, Paul E. Eggert.

THE COURT: Thank you, counsel. Now, the Court understands from conference with

counsel in chambers just before the hearing that the currently pending Motion to Disclose the grand jury materials can be taken under advisement based upon the papers. Can counsel confirm that?

MR. EGGERT: That's correct, your Honor.

MR. TERRISON: Yes, your Honor.

[4]

THE COURT: Thank you. And the Court also understands that no counsel wishes to envoke the rule to sequester witnesses, is that correct?

MR. EGGERT: That's also correct.

MR. TERRISON: Yes, your Honor.

MR. HOWARD: Yes, your Honor.

THE COURT: Fine. Very well. Mr. Terrison, does the government have an opening statement?

MR. TERRISON: Your Honor, Mr. Cab

Howard will open for the proponents of the statute.

THE COURT: Thank you. Mr. Howard?

MR. HOWARD: Thank you, your Honor. This case involves a challenge to a state statute Title 12 Section 7613 of the Maine Revised Statutes which provides simply and I quote, "A person is guilty of importing live bait if he imports into this state any live bait including smelts which are commonly used for bait fishing in inland waters." This statute to understand its place in the statutory structure of the Maine laws, should be read in conjunction with Title 12 Section 7202 which permits the importation of other kinds of fish other than live bait into the State so long as those fish have a certificate from the fish pathologist that they are free from diseases. So that the statute, in short,

is to permit importation of most fish into the State with a certificate that they are disease-

[5]

free but to prohibit the importation of live bait.

THE COURT: What was that other section, Mr. Howard?

MR. HOWARD: Section 7202.

THE COURT: 7202?

MR. HOWARD: Correct. The prohibition against the importation of live bait is a statute of some antiquity. It goes back at least into the 60s, I believe, but in the 20 years or so as the evidence today will disclose the concerns of the states around the country over the movement of fish and, therefore, fish disease has increased. So this is not by any means an unusual statutory scheme here.

Nonetheless, the prohibition that we are dealing with here today does raise commerce law questions. And the state and the federal government certainly concede discriminatory action against interstate commerce. And the only way that such a statute can be found to not violate the commerce laws is if it falls within the jurisdictionally recognized exception to the commerce clause prohibitions for quarantine regulations.

The authorities for that exception is set forth in the brief which Mr. Terrison filed with the Court some time ago.

So the state is here today and the federal

[6]

government is here today to put on evidence to demonstrate two things: First of all, that there is a legitimate threat to the

environment of the State of Maine posed by the importation of live bait fish. We will have a fish pathologist, an academic expert, testifying as to the nature of the disease and the nature of other threats that the importation of these fish pose to the state; and secondly we will also seek to show that there is no other practical way of defending the state against this threat except by prohibition. The general theory being that bait fish are small and difficult to inspect, which would be the alternative on the inspection program. They are difficult to inspect, they come in vast quantities; and it simply would be impractical to expect the state to inspect every fish that was coming in to be sure it doesn't have any diseases or there were no other undesirable fish in the batch. And we would suggest that if we can show that

there is a legitimate threat than a prohibition is the only practical way to defend ourselves against the threat that we would have carried our burden with the exception of the commerce clause and that the statutes should be sustained against the commerce clause challenge.

I only want to add one more word, a bit about the fish industry in general. This is going to come out in the course of the evidence but it might be useful to

[7]

understand in advance what is going on here. Fish farming that is the farming of bait fish, is a big industry. It is apparently the third largest fish agriculture industry and it is a growing industry. And it is not surprising, although the statute has been on the books for a couple of decades or so, that a

challenge now is being mounted to it because there are people including, I imagine, we will hear later today the defendant in the case who wished to engage in the activity and finds that these statutes are a barrier to the development of that. So this is something of an important case for which the courts are being asked to resolve, if you will, the tension between the growing industry and the needs of the various states to protect themselves against disease moving around the country.

I think your Honor is aware of what is alleged against this particular defendant by reading the indictment and I don't propose to get into that. I don't think that is material except that he is charged with importing bait fish in this case. And I think with that in the way of

an opening statement unless the Court has any further questions we would call our first witness unless the Court wishes to heard from other counsel.

THE COURT: Let me inquire if the defendant wishes to make an opening now.

Mr. EGGERT: I think I prefer to reserve

[8]

my right.

THE COURT: All right. Fine.

Mr. TERRISON: In that case, your Honor, we would call Mr. Peter Walker as our first witness.

PETER WALKER, was called as a witness on behalf of the plaintiff, and having been duly sworn by the Deputy Clerk, was examined and testified as follows:

BY THE CLERK:

Q Please be seated. State your name and spell your last name for the record?

A Peter Walker, W-A-L-K-E-R.

THE COURT: Mr. Walker, please try to speak up. The court reporter will want to hear everything you say.

DIRECT EXAMINATION

BY MR. HOWARD:

Q Mr. Walker, by whom are you employed?

A I am employed by the Maine Department of Inland Fisheries and Wildlife.

Q And what is your position with that department?

A I am the fish pathologist.

Q Are you the state fish pathologist?

A That's correct.

Q Would you give the Court a brief outline of your education, please?

[9]

A I have a bachelor's degree in zoology from the University of Maine in Orono.

Q What year did you take that degree?

A I graduated in 1970.

Q What was the subject?

A Zoology.

Q And within that subject of zoology did you have any emphasis on your course work?

A Yes. I took as many courses as were available at the undergraduate level in fisheries science and took other courses that related to fishery science.

Q Did you have any further education beyond your degree at Maine?

A Since graduating in 1970 I have taken evening courses within the University of Maine pertaining to education.

And in 1978 I went back to Orono for one semester in the spring of '78 to take microbiology and virology courses in preparation for graduate studies at
the National Fisheries Academy in Leetown, West Virginia in which I took a nine-month course in fish pathology. It's called the Leetown Long Course. It's offered by the U.S. Fish and Wildlife Service.

Q And did you graduate from that course?

A Yes. I received a certificate of advanced study in fish pathology.

[10]

Q Could you tell the Court a bit more about that course? How many people attended? How often it is given?

A It's given every two to three years. It's a fairly select course; 81

people to date have graduated from it in 22 years of its existence. It's a course in which experts are called in to or are hired from around the country to teach the course in various subjects of fish pathology. It's a very intensive course. It involves day-long studies, a series of lectures and, lab work; an extremely intense graduate level course.

Q And just to reiterate how long does the course last?

A That particular course lasted from September through March.

Q Now, would you give the Court an outline of your employment experience? Pertaining to fisheries in particular?

A Yes.

A Since 1972 I have been employed by the Department of Inland Fisheries and Wildlife. I began as a fish hatchery man working at a fish hatchery in Casco: two and a half years later I became assistant manager in fish hatchery in Enfield; after that I became a fishery management biologist; then assistant regional fishery biologist; and then in 1978 I went back to work for the hatchery division; went to school for close to a year .

[11]

and a half and since that time - -

Q Excuse me. That school was the fish - -

A The combination of the University of Maine and the Leetown course.

Q Right.

A And since the spring of 1979 I have been employed as the fish pathologist for the Department.

Q Have you done any teaching in this field?

A Yes. Since 1979 I have taught short courses in fish health management at the University of Massachusetts and two courses in the North Carolina Community College system. And I have assisted in another course at Unity College in Maine.

Q Are you planning to do any more teaching in the near future?

A I have been invited to teach at the Leetown Long course at the National Fisheries Academy this coming spring.

Q Have you done any writing with regard to the subject of fish pathology?

A Yes, mostly of a popular nature; newspapers, car magazines, science articles. I currently write articles in three different publications; regular column on outdoor subjects and particularly pertaining to fisheries.

Q Now, to move to the substance of the testimony

[12]

perhaps you might tell the Court what bait fish are.

A Well, I'm not sure of the Maine statutes really -- I guess they don't have a strict definition of bait fish. But commonly bait fish are any small fishes that are used as bait to catch larger fishes.

Q Now, as you know this case concerns a statute which prohibits the

importation of bait fish into the state. Presumably that statute is designed to protect the state against a threat of some kind.

A That's correct.

Q Could you outline for the Court what the principal threat or threats are to the state's environment which are posed by the importation of bait fish?

A We have two major fields of concern regarding the importation of any fish and particulary bait fish. The first concern is the possibility of introducing parasites and other disease-causing organisms that might be detrimental to our fish population here in Maine. The second and at least equally important reason for our concern is the threat of introducing non-native fish, exotic

fish, if you will, into the state which might become established in the Maine environment and cause harm to existing fish populations.

Q So, to restate, you believe there are two major

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categories of threats: parasites and bacterial diseases: that's one?

A Um-hum.

Q And exotic species?

A Right.

Q And now, let's focus on the first of those. With regard to parasites there are particular parasites that you believe to be a particular threat to the state's environment?

A With regard to bait fish?

Q Yes.

A You mean specifically?

Q Yes.

A Yes. We know that bait fish have or we presume that bait fish have been imported into the state for a variety of sources including the Great Lakes area and the southeastern United States. Taking a look at what we know to exist in the bait fish industry in the southeastern United States, for instance, we have identified several parasites that we know are in existence in that area. And we do know that from prior experience and prior surveys to a reasonable extent, anyway, that they are not in existence or were not at least previously in existence in Maine fish populations.

Q Can you give us some examples?

[14]

A There is a roundworm parasite that causes an intestinal disease in shiners, among other things called Capillaria catastomi.

Q Would you spell that for the record?

A Capital C-A-P-I-L-L-A-R-I-A; new word catastomi, C-A-T-A-S-T-O-M-I.

Q And are there other parasites that you are concerned about?

A Another parasite that we know to be a problem in southern bait fish that we have no evidence has existed in Maine is a small parasite called Pleistoplora ovariae.

Q Could you spell that, please?

A Capital P-L-E-I-S-T-O-P-L-O-R-A; new word, O-V-A-R-I-A-E.

Q And are there others?

A And a third is a parasite with a common name of tapeworm. Its

scientific name is Bothriocephalus opsalichthydis.

Q Could you spell that?

A Capital B-O-T-H-R-I-O-C-E-P-H-A-L-U-S; new word, opsalichthydis, O-P-S-A-L-I-C-H-T-H-Y-D-I-S.

Q Now, returning to the first of these three parasites that you have discussed that your named that's Capillaria catastomi, would you describe how this parasite works and what its danger is to fish?

[15]

A Well, it's a parasite that has recently come into the forefront in fish pathology. It is a small roundworm parasite, a tiny worm, that embeds itself in the lining of the gut of the host fish - - in this case golden shiners - - and for the most

part very tiny reddish worm. It causes a disease called enteritis which is an inflamation of the intestinal lining of the fish.

Q What is the ultimate effect of that on a fish?

A It is apparently a debilitating disease. It simply slows down growth; causes the fish to grow more slowly and in some cases does cause disease serious enough to warrant concern possibly even killing the fish.

Q You say grow more slowly. You say the fish would actually achieve a smaller size?

A Right. The name of the game in fish culture is to grow a fish to a marketable size in a certain amount of time. And this would be a

hinderance in the fish culture business.

Q Now, could you tell the Court as to whether there has been an extended presence of the Capillaria catastomi in the State of Maine?

A To the best of my knowledge we have never had this organism in the state previously. There is a noted fish pathologist who did a comprehensive study in Maine fish parasites years ago and at that time the organism

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was not found. And since that time my predecessor in the job and myself have looked for this from time to time. I myself have looked for it intensively during the last five years in wild minnow populations specifically and right up until the

winter of 1983 I had never seen it nor to the best of my knowledge had it ever been recorded in wild fish populations.

Q And what happened in the winter of 1983?

A In 1983 in the course of examining fish from wild populations around the state from known sources it began to show up in many, many areas, many drainages around the state and also in other species of fish.

Q What would be your opinion for the cause for the development of this?

A Well, I would say that the evidence certainly points to the probability that the parasite was introduced from out of state sources, probably through illegal fish importation.

Q Now, you have also, as I understand it, examined the fish that were the subject of this particular case, is that right?

A Right.

Q Did you find any Capillaria catastomi in those fish?

A Yes, I did. I found it in low to moderate numbers in those fish.

[17]

Q Now, moving on to the second of the parasites that you identified as a threat - - that's the Pleistoplora ovariae, would you describe how this parasite operates and why it's a threat to fish?

A Well, this is a protozoan parasite, a one-celled miscroscopic spore. It's a very tiny organism that lives in the ovaries of golden shiners. It

slowly consumes the ovaries, the egg-producing tissues of female golden shiners, and renders them sterile or at least unable to reproduce themselves.

Q And how would that effect the fish population?

A In a fish culture situation where you are growing these fish in a pond it would simply mean that your brood stock would become unable to reproduce. In such situations in the South at least where golden shiners are raised and where this parasite is present they are forced to use first year's brood stock, the ones that have the least damaged ovaries and simply disregard the brood stock after they have to manage around it.

Q How about in the wild?

A In the wild I'm not aware of studies that can confirm or deny its impact. I would say, though, being familar with the Maine environment since we do have golden shiners here in the wild and we are at the northern

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extreme or near the northern extreme of the range of the golden shiner that it is possible, certainly in my opinion, that it would have some negative impact on our golden shiners. We do know that our shiners here in Maine live much longer than they do in more southern climates, although they grow more slowly, therefore they are able to reproduce every many more years than having a longer life span. And in my opinion this could very well have some

detrimental effect on the animal here in Maine, because its biology is quite different than other areas in the country.

Q Let me ask you a question that is a little bit out of order, but I think it maybe confusing to the Court. You've talked about golden shiners frequently throughout this discussion. Golden shiners are a kind of bait fish?

A That's correct.

Q And are they a common type of fish that would be imported?

A Right. The golden shiner is the most intensively cultured of all of the bait fish species that are grown commercially, and it is these species that is probably most often shipped into the northeast from the southeastern industry.

Q And Maine has golden shiners?

[19]

A We do have golden shiners. It's a species that has a wide range across North America.

Q Now, to return to the effects of the Pleistoplora ovariae, in your experience have you found any Pleistoplora ovariae in Maine?

A I have never found it in the wild fish in the state of Maine.

Q When you inspected the fish who are the subject of this case did you find them in those fish?

A Yes, I did. By selecting the larger fish that were sexually mature, the larger females, I did find Pleistoplora ovariae in those fish. And I have also seen it in bait of out-of-state origin in the past also.

Q Now, finally, turning to the third parasite that you identified, the Bothriocephalus opsalichthydis --

A Right.

Q - - could you describe how that parasite works?

A Well, it's a very large tapeworm. It's an adult tapeworm in its final form in the fish. It lives with a head and, if you will, embedded in the lining of the intestine usually of the fish and it actually feeds on the same food that the fish eats. As it passes through the digestive tract it sort of steals the food from the fish. It grows very, very fast.

[20]

Q What does that do to the fish?

A Certainly by stealing food from it it is reducing that fish's ability to

grow. But the major problem in bait fish, at least, is that it grows so quickly and grows so large that it literally outgrows the fish; plugs the fish's intestines and it's unable to continue and digest food and kills the host fish.

Q It kills the fish?

A That's right.

Q So, unlike the Capillaria catastomi which slows the growth of the fish or the Pleistoplora ovariae which causes sterility, the Bothriocephalus opsalichthydis kills it?

A That's right.

Q Could you tell the Court briefly how this tapeworm happened to come into the country?

A The evidence is circumstantial, but we do know that it is a parasite

which is found in its native range in grass carp, an Asiatic species in Asia. During the 1960's there was much interest in bringing grass carp into the United States as a commercial fish crop, and some of them arrived in the southeastern United States of unknown but suspected illegal origin during the mid 1960s. And during the same time the Asian tapeworm - - sometimes called the grass carp tapeworm - -

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also made its presence in the southern fish farming industry. And we assumed it probably came in with the grass carp during that period. Since that time it has spread pretty much throughout southern fish farming industry and bait farming industry.

Q What would happen if the tapeworm were to come into the state of Maine - - excuse me, let me ask a prior question.

Have you ever found any tapeworm in the state of Maine?

A I never have seen it in any wild fish in the state of Maine. Last winter I did find it in one golden shiner purchased from a bait store which I can only presume came from an illegal source although I have no knowledge one way or the other. That is the only Asian tapeworm I have ever found in Maine.

Q What would happen to the state if the tapeworm were to become established here?

A If it were to become established here we fear that because this worm has no

host specificity, it has no preference as to what kind of a fish it effects, at least little preference, we are very concerned that if it were to become established here in Maine that it would have an adverse effect upon wild fish populations, small slow-growing fish populations, that in turn would

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have an adverse effect that depends upon them for food and specifically our smelt populations which are the principal food fish or fish like salmon and lake trout populations.

Q And so, in short, the introduction of the tapeworm would have a direct effect on game fish in the state?

A Certainly if it became established the possibility is there.

Q Now, when you examined the fish that are at issue in the case did you find any tapeworm?

A No, I did not.

Q Now, aside from these parasites that we have just been discussing are there any other kinds of diseases which would concern you if bait fish were allowed to be imported into the state?

A Well, fairly recently I'd say about three years ago my counterpart in the state of Wyoming, a fish pathologist out there, reported to the society, the American Fisheries Society, that the fish health section, however, that he found two very serious health diseases usually related in salmon and trout in the bait fish shipment that were mailed. These diseases are

called enteric, E-N-T-E-R-I-C, disease; redmouth - - all one word, R-E-D-M-O-U-T-H and furnunculosis spelled F-U-R-U-N-C-U-L-O-S-I-S. He found these two diseases in

[23]

Emerald Shiners, a specific species of shiners that were shipped in the midwest. In fact it called most of the shiners after they were shipped to Wyoming.

Q But it is a disease which could also be contracted by salmon and trout?

A Yes. It's usually - - both of these are very serious diseases of salmon-trout usually associated with them, but they are known to be the organisms that cause these diseases are known to be potential pathogens or disease-causing agents of other fishes; in this case shiners.

Q Now, turning to the second major category of threat that you identified, that is the introduction of exotic species into this state, could you give the Court the idea of the nature of the Maine fish environment and its origins?

A Well, the Maine fish communities are rather unique among the eastern states. The state of Maine during the ice age was pretty much scoured clean of ice and glaciers where golden shiners resided. The state was recolonized by the comparatively small number of fish. In the state of Maine we have very pure and clean water in most of our lakes -- this differs from lakes further south -- and they were populated by a rather delicate community of just a few species of fish. The dominant

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fish of much of the state was brook trout with lake trout and other types of salmon and trout present in other waters in conjunction with a few minnow species and sucker species and just a few other fish which we refer to as white perch, pickerel. We sometimes call these warm water fishes because they are more tolerant of adverse conditions then the others.

We are fairly confined to just a few southern water drainages. We had a balance of just a few fish species which are not able to compete with other fish species as well as more common types from further south.

Q Now, could you also tell the Court in a general way what happened when an

exotic species whether a fish species or some other kind of exotic animal is introduced to a foreign environment?

A In many cases not all cases but in most cases when a new species is successfully introduced into a new environment it occupies -- it takes up a niche in this environment. It competes with food, for living space of other fish species, or whatever species we might be talking about, whether they are bird, animals or fish and something that was there already in many cases has to move aside, has to make room for the new species. In certain cases exotic species have been introduced that were so competitive that they were

[25]

able to almost completely displace or in some cases completely displace existing species that were unable to compete. This has been the case in Maine, especially with our native brook trout. Originally we had brook trout populations and probably they were the dominant fish populations in many lakes through the coastal area through the state. With the white man coming along and spreading some of the coarse species such as pickerel and perch throughout the state these displaced the brook trout and the brook trout has disappeared from much of its habitat in the state and sort of just receded northward.

Q Can you give the Court an example of some small non-fish exotic species

which have established themselves in the country?

A Well, one of the best examples --

MR. EGGERT: I object, your Honor. I don't know what relevance that has to this hearing.

THE COURT: Mr. Howard?

MR. HOWARD: Well, we are just trying to give the Court a general idea as to how an exotic species can take over. And we thought it might be useful for the Court to know in other animal contexts what famous examples there are of exotic species doing that. I don't think that it's any less relevant than having Mr. Walker talk about

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fish and the processes as just a general one.

THE COURT: Mr. Eggert?

MR. EGGERT: I think it ought to be limited to fish. How do we know that the same foundation or the same basis for the population of other animal species is the same as for fish? And we are going to try to draw conclusions that these same things can happen in the fish population that happen in the animal population. Perhaps there are examples in the fish population. He's already given some

THE COURT: Thank you, Mr. Eggert. Mr. Howard, I will sustain the objection.

BY MR. HOWARD:

Q Fine. Could you give a famous example of a fish that had been introduced whether in Maine or elsewhere that had a disastrous effect upon the local environment?

A Probably the most well-known example is a common carp. It's a Eurasian species that was imported into the North America in the late 19th century. It was imported under the best of intentions. It was thought it would be a good fish crop to be grown in the mid west, what was then called the U.S. Fish Commission brought numbers of these from Europe and sped them by special railroad car all the way across the United States. They were also introduced into Canada at the same time. It has

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yet to fulfill its potential as a commercial crop here, but it is an extremely competitive, extremely adaptable fish. And it has become

established like everywhere it has been stocked in the states including the state of Maine.

We do have two small confined populations of carp in Maine both in coastal fresh water situations where they are confined by upstream dams from reaching the interior of the state.

The adverse effects these have caused has been direct displacement of fish species through competition, their ability to out-compete other fish and also the fact that their feeding habits consist of sucking up mud and debris from the bottom of the lake and pond and spitting it out again and clouding up the water. In doing so they have turned what was originally clear water as muddy.

This prevents some light from penetrating into the pond and prohibits plant growth or slows it down. And that has not only affected that waterfall and where their fish plants are no longer able to grow.

Q Of course a carp cannot be mistaken for bait fish? It's a big-big fish?

A No. In fact, small carp are used in some states where they were wildly distributed. When they are babies they

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are used as bait fish.

Q So, you would believe that it's possible that a carp or two might get into the stock in the live bait fish?

A I certainly think that's possible.

Q Are there any kind of bait fish species that you would be concerned about coming into the state?

A We're concerned about any non-native fish species coming in. The trouble is we don't know what the impact would be in establishing any non-native fish until it's here and it's too late to do anything about it in many cases.

Q There are other cases in the country where many types of bait fish are not native to them?

A Many, many different cases.

Q About how many exotic species of fish have been introduced into the United States, would you say, over the years?

A Well, if you count a quorum species I guess the numbers would be in the hundreds of that. I read a recent U.S. Fish and Wildlife document which stated that somewhere around the current time 905 foreign fish

species, exotic fish species, have been found in the wild in the United States and of those I think the latest count is somewhere around 44 known to be reproducing and known to be basically out of control and have become established

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in parts of the United States.

Q And what about the state of Maine? Do you have any testimony as to whether any exotic species have been established in the state of Maine?

A Well, in our case I guess we would call an exotic species any non-native species in the state. The list goes on. In the last seven years in fact we have found seven new species of fish that have become established in state waters. If you go back over

the history of state fish species I believe we have about 35 native fish water species in the state. In addition to that the list is, let's see -- we have at least --

Q Excuse me. You say there is approximately 35 native species and in the last seven years there have been seven new?

A In addition to non-native or exotic fish species that have become established in the last 100 years or so on top of that.

Q Of those seven species are any of them of bait fish species?

A Yes. In fact, three of the new species of fish that we have found in the state are considered bait fish. They are all minnow species. One is called the Silvery Minnow; another is

called Spot Tail Shiner and the third is called the Emerald Shiner.

[30]

Q And do you have any opinion as to how those species got established here?

A We have seen all of these species I think meshed in with shipments of another species or in specific shipments of those species that have been known out-of-state origin and smuggled into the state of Maine.

Q Now, with regard to the shipment that is at issue in the case here did you find any exotic species in those fish?

A In this particular shipment we did not find any species of non-native or of any kind of fish except golden shiners. We did, as I recall, find some polliwogs and we did find some crustacean crawfish.

Q Are those any kind of problem for the Maine environment?

A We don't know. We assume them to be of potential problem. That's the trouble with introducing any exotic species. Unless you put millions of dollars into research to find out ahead of time -- and that's very, very difficult -- you just don't know what the adverse effects are going to be until it's too late.

Q Now, turning away from the various threats that you have been describing imposed by the importation of bait fish into the state, I want to ask you a few questions about how the state can defend itself against

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those threats.

With regard to parasites and

bacteria, could you advise the Court as to whether it would be possible to conduct any kind of inspection program of incoming bait fish for parasites or bacteria?

A Certainly a program as such would be possible. The question is whether or not it would be effective. One problem we have is at the present time we do not have any established procedures for the inspection of these particular diseases of particular concern.

Q Is there such a scientific procedure available for other kinds of fish?

A Yes. In the case of salmon and trout we have a professional standard outline and updated every 10 years by the fish health section of the American Fisheries Society the

so-called Blue book. It is a manual of procedures. And these have been worked out over decades of research.

Q And the objective of that procedure is to do what?

A That it is to effectively control and prohibit the spread of unwanted fishes where an area where they are grown to an area where they are not found.

Q How does it do that? How does the procedure guard against the movement of disease?

A It is simply a tool to allow you to avoid those diseases.

[32]

Q How does it do it?

A Specifically how?

Q Yes.

A Okay. In the case of Salmonidae, that is salmon and trout diseases, we

have a list of diseases which we consider to be both serious and controlable by inspecting and avoidance. We have bacterial diseases that have been identified that are serious bacterial disease, serious virus and serious parasites. For each one of those we go through a statistical random sampling, usually 60 fish per lot per station. And we go over 60 fish of each lot at a particular salmon or trout ranging station. A lot would be a group of fish of the same parental origin and of the same age. So you might have ten lots of fish or only one of a particular fish hatchery.

A qualified fish pathologist would then examine those fish according to

all of these procedures set forth by the American Fisheries Society and hopefully come up with a certificate certifying that none of these diseases were found.

Q In short, the fish pathology committee is satisfied by that using this procedure?

A Yes.

Q You can detect with certainty whether or not there is a

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disease in a batch of salmon?

A Certainly with reasonable certainty. These procedures have been worked out over decades of research and millions of billions of dollars of research to be the best available according to the present technology.

Q Now, is there such a procedure for bait fish?

A At this time there is not.

Q Would that be one reason, do you think, why the state has this statutory scheme which distinguishes between bait fish and other fish?

A Certainly, yes.

Q Now, are there any other reasons why an inspection program for bacteria and parasites would be impracticable?

A Well, there is certainly a very vast difference between the physical layout of bait farming and also the nature of the industry and the salmon and trout culture. In salmon and trout culture the fish are usually grown within a discrete area, a certain number of raceways and pools in a certain area. The bait fish are

more extensive. These are grown in surface ponds filled by surface waters which may contain other species of fish. And they are grown over hundreds and even thousands of acres in the south. So it would be, in my opinion, very difficult to get and extremely expensive

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to get a complete example of a fish farm down there. One of these large fish farms does. You have so many different lots of fish spread over such a large area.

In addition, the way the industry is set up often times bait from more than one farm are shipped to intermediate dealers, distributors, where they are pooled together, held in various holding facilities and

then distributed off to smaller dealers from there in such a way that it would be impossible under those circumstances to ever have a fish disease certain that would be of any value.

Q Let me see if I understand this. In the case of salmon and trout your testimony was that those fish are found in very small controlled circumstances, and is it the case that the certificate which the state requires is issued at the place where the fish are grown?

A That's right.

Q And that is easily done because it's relatively controlled?

A It is confined and shipments allowed in the state of Maine would allow for a shipment directly from the

inspection station into the state from point to point with no intermediate dealer.

Q But the nature of bait fish farming is such that it would be difficult to do?

[35]

A Very difficult.

Q Let me ask one more question. When the trout and salmon come into the state they are not inspected at the border?

A No. These procedures take a number of weeks to complete.

Q Why couldn't you inspect the bait fish at the border and that would eliminate this problem of multiplicity of sources? And why don't you take the truck at the border and send it to some kind of

inspection station and check it out that way?

A The reason for that case would be it would take several days to complete these tests, especially if we were going to inspect for bacterial pathogens. And during that period of time the fish would have to stay on the truck and that just wouldn't be possible. Probably 48 hours is about as long as you can practicably keep the fish alive and sustained on a transportation vehicle.

Q So, the inspection is unable at the border because it would take too long and the fish would die?

A Yes.

Q Now, let's talk a little bit about the inspection on exotic species.

What's the problem for inspecting exotic species at the border?

[36]

A Well, theoretically at least all it would take to establish an exotic species in the state of Maine would be a one male and one female of an exotic species. We are dealing with a very large number of fish in these shipments. The fish shipment we are talking about today involved approximately 158,000 little gold shiners. These were fish of, as I recall, 70 fish to the pound. If there were exotic fish mixed in with the shipment of that size all there would have to be, at least in theory, would be two fish, one male and one female mixed in with 158,000. The only way to inspect for those would be by handing through every one and count through every single fish in

that shipment. This is a physical impossibility.

Q And that would also run into the problem, would it not, that you were just discussing? It would take time to do that?

A It certainly would, an extreme amount of time.

Q At which point the fish wouldn't survive?

A Right.

Q One more question regarding inspection of fish for parasites and disease.

Even though there is no scientific sampling method that has been established, could you inspect each fish for diseases like that?

[37]

A Unfortunately the inspection procedure for these requires the

sacrificing of the individual fish. So, yes, certainly it could be done if one had enough time to do it, but it would require killing those individual fish.

MR. HOWARD: All right, That's all the questions I have for this witness, your Honor.

THE COURT: Thank you, Mr. Howard. Cross-examination, Mr. Eggert?

CROSS-EXAMINATION

BY MR. EGGERT:

Q Good morning, Mr. Walker. Would it be fair to say that the statute prohibiting the importation of bait fish is one of the causes of all of these problems rather than a solution to these problems?

A No, sir. I think it is a solution to -- it is a protection for our fish communities.

Q So, to this moment it hasn't kept out the Spot Tail Shiner?

A That's correct.

Q The Silvery Minnow?

A Right.

Q The Emerald Shiner?

A Right.

Q Wouldn't it be better if we regulated the industry

[38]

rather than prohibited so that we would know that the bait dealer would be going to Arkansas to get a certain species to, to give an example, because that is certainly a main area of the industry, a certified bait farm and in which we know to a great certainty that they are raising only golden shiners and allow the bait dealers to bring back to the state of Maine to use as bait fish?

A If it were possible to obtain such a certainty it certainly would be better.

Q Why is it not possible?

A As I pointed out the circumstances are such that this is an impossibility in my opinion.

Q Why is that?

A Well, as I have just pointed out at the present time we do not have the technology to inspect for these diseases, at least none that has been agreed upon by the Professional Society and, I believe, that it's a physical impossibility to guarantee that other species of fish will not be mixed in with these because of the nature of the industry, the physical layout of the farms and the way that they are shipped.

Q Well, in this particular case it's dealing with 158,000 fish. You had no difficulty inspecting them for diseases, did you?

[39]

A There is a difference between inspecting a lot and saying for certain that something is or is not there in examining those fishes I did.

Q Well, in this particular case, as I understand it, you found Pleistoplora ovariae but no Asian tapeworm?

A Right.

Q Wouldn't it be fair to say that that was a legitimate finding?

A I certainly could not put my signature on a certificate to say that no Asian tapeworm was present in that lot.

Q How many more fish would you have had to examine?

A Perhaps all of them. In the case of the Asian tapeworm that is a parasite that is suppressed by means of chemicals added to the feed in these fish. It's not eliminated. I don't think you could ever guarantee that the Asian tapeworm could be eliminated from the farm where the organism is known to be present. But they do add a chemical to the feed which controls the Asian tapeworm within that population and certainly reduces its numbers to a very small number. Until it has been proven scientifically that there is some way to guarantee that an inspection for the absence of that worm, I certainly could not put my signature on it.

Q By small numbers what do you mean? One percent of the population?

[40]

A Perhaps. I really don't know.

Q There are no standards in the blue book for statistical sampling when we know there is one percent or greater incidence?

A Yes. And in the case --

Q Let me continue on in that. Do we not know from the blue book that there is accepted number of fish that can be sampled from a population if we know the incidence of a particular disease and if we found that sample disease-free we can certify it?

A Yes. For five percent or two percent incidence. All it would take, though, if I could add, that is just one or two worms to establish the population.

Q Do you know of any reported incidences in the Asian tapeworm of it being found in the wild?

A Yes, sir, I believe so.

Q Where?

A I understand that it has been found in Kansas in largemouth bass.

Q Has that been reported anywhere?

A This was word of mouth from a colleague.

Q Several species that we have in Maine, not of bait fish but other types of fish, have been deliberately introduced by your department, have they not?

A Yes, sir.

[41]

Q Rainbow trout?

A Um-hum.

Q Were there millions of dollars spent for research before introducing that into the State of Maine?

A No. But in the case like that that is one that has been widely distributed throughout the world, and the impact of that species in similar environments was already known.

Q Hasn't golden shiners been widely distributed throughout the world?

A Yes, it has.

Q Do we know the impact of that throughout all of those species?

A Of the species themselves?

Q Yes.

A Generally, yes.

Q So, there is nothing about the golden shiner inherently that it should be kept out of the state of Maine, is that fair to say?

A Not of the species itself. I don't believe that we really know what differences there may be between strains of golden shiner native to Maine and strains of golden shiner from the southeastern United States. There may be some differences in strains there that might not be as desirable.

[42]

Q Have you noticed any particular problems with golden shiners in the state of Maine that you have been doing your intensive research on?

A What sort of problems?

Q Any problems?

A No. I guess I couldn't say that.

Q It would be fair to say, would it not, that your department estimates anyway that there have been millions

of illegal bait fish brought into the state of Maine over the past five-ten-fifteen years maybe?

A Correct.

Q And so far that hasn't -- you haven't been able to demonstrate any problems that have arisen because of that?

A We can demonstrate that we have some new species of fish that may very well come in with golden shiners. We don't know what the impact will be yet, and we also have one new parasite that may have come in with golden shiners and again we don't know what the impact will be as of yet.

Q You say you have been working as a fish pathologist for the State of Maine since about 1979?

A Correct.

Q And as part of your duties in this particular case you examined a load of bait fish that was stopped, I believe,

[43]

this would be now December of 1981?

A Right.

Q And in that examination you reported finding Pleistoplora, is that correct?

A Um-hum.

Q Would you describe for me how you found the Pleistoplora?

A I selected among other fish that I selected from the shipment, I deliberately took some of the larger individuals because from past experience I know that sexually your chances of finding sexually mature fish are greater if you do select the larger fish. They tend to be

sexually mature females; taking these back to the lab and found some of those larger females did turn out to be sexually advanced females. the color is consistent and with control techniques in this particular case I found some off-colored small big spawns in ovaries of Pleistoplora; took these out and made a swatch on the microscope and examining it under the microscope found that they were indeed spores of the Pleistoplora ovariae.

Q And you also made Capillaria catastomi slides?

A Um-hum. In that particular case I removed or excised the digestive tract of the fish, the esophagus, stomach and intestine and examined it very highly under

[44]

microscope. And I squashed this between two microscope slides and examined it under low power on the microscope and found these worms embedded in the lining of the gut.

Q What other duties do you have in your job with the state of Maine other than the fish hatcheries in the wild?

A Primarily it involves the fish-health concerns of our nine fish hatcheries. This involves so-called blue book inspections of those on an annual basis as well as trouble shooting when we have specific fish health problems during the year.

Q Are those hatcheries primarily concerned with Salmonoids. And are all of the fish that are in those hatcheries raised in the state of Maine?

A Yes, they are.

Q Are brood stock brought in from other hatcheries throughout the state of Maine?

A We have on occasion shipped eggs into the state from certified sources.

Q What other types of fish, if you know, are imported into the state of Maine?

A Mostly at this time other Salmonoid fish by private fish hatcheries, usually in the form of eggs. Federal fish hatcheries do import into the State as well, again usually eggs and tropical fish and goldfish for

[45]

aquarium purposes are freely imported into the state of Maine.

Q Do the private fish hatcheries and the federal fish hatcheries bring in

certified eggs or even on occasion certified brood stock?

A In recent history I don't believe brood stock has been brought in; just eggs.

Q And then those are raised in hatcheries here in Maine. And how is it that we would know that these eggs do not bring diseases into the state of Maine?

A We know by experience afterwards if these fish do not come down with diseases for which they have been inspected.

Q These fish are held in hatcheries and they have to be inspected before they are used?

A No. There is no law stating that, although they are inspected on occasion depending on the situation.

Q The state of Maine could conceivably allow eggs that were diseased to be brought in; they could be raised in hatcheries and distributed throughout the state without you knowing it?

A I guess. I don't understand.

Q I thought you just said that once the eggs are brought in there are no official inspections program required?

A That is correct for private hatcheries. Our main line

[46]

of defense is prior to the shipment to insure that those are clean products coming into the state.

Q So, those are certified in some fashion or inspected in some fashion before?

A Yes.

Q But you say that kind of certification is impossible in the golden shiner industry?

A I don't know that it is impossible. I just know that the procedures have not been worked out at this time. And I rather suspect they are because we are comparing an extensive fish farm with an intensive growth hatchery.

Q You suspect they are being worked out or that they are impossible?

A I suspect that they are not practicable because of my knowledge of their setup.

Q You've stated that you, as far as you're concerned and from your experience, Pleistoplora ovariae does not exist in the wild in the state of Maine; is that a fair statement?

A As far as I know, yes.

Q You must base that upon some at least unofficial sampling technique, do you not?

A That's right.

Q I take it that your testimony is that you wouldn't dare to certify to that?

[47]

A That's correct.

Q But you're willing to use that as an assumption upon which to base, allow, that would deprive another person of his livelihood?

A I think that's rather broad, the way you've stated it. You're talking specifically about Pleistoplora ovariae.

Q And several others.

A And several others. If you add all of those others together, yes I would say that better safe than sorry.

Q That same thing is true -- did you say you found Capillaria catastomi in the wild now?

A I have now.

Q And under what circumstances did you find that?

A Examining fish that have been gathered from known state sources from various wild populations; examining them in the same manner I examined the bait.

Q And you found that in 1983?

A In the past winter, yes.

Q Do you know of any other northern state where Capillaria catastomi have been found?

A I have no knowledge of its distribution.

Q Then you obviously couldn't agree with me that the Capillaria is widely distributed?

A I understand that it is distributed south of here. I do not know how extensively.

[48]

Q Would you agree with me that the other 49 states in the continental United States do not prohibit the importation of bait fish?

A No.

Q What states prohibit it?

A I don't have the information in front of me. I know that one western state as we do flat out prohibit it. Others prohibit the use and importation of it into certain drainages.

Q They regulate it, in other words?

A It is regulated in any state.

Q There are several states, are there not, that in a sense prohibit the importation of bait fish because

these prohibit the use of live bait?

A That's correct also. The state of Alsaka would fit into that category.

Q And two or three I believe western states?

A Could be. I don't have extensive knowledge of that.

Q Would you agree with me in any event that at least the states in the northeast don't prohibit the importation of bait fish?

A That's correct. it is regulated, however, in some of those states.

Q New Hampshire is regulated?

A Right.

[49]

Q Massachusetts? That's just a recent development, is that not correct?

A Right.

Q If the state of New Hampshire is doing a bad thing as you would

contend I guess by only regulating the importation of bait fish, how is the state of Maine going to keep these problems out?

A We are doing what in our good conscience is the right thing. And we are certainly hoping that our common border with new Hampshire is not going to -- the problems that New Hampshire may be inviting upon itself are not going to cross into Maine. If they do we will have to make some sort of -- take some sort of precautions to keep whatever may come across into the common drainages in New Hampshire through and across the rest of the state.

Q You couldn't possibily stop it, could you?

A From New Hampshire?

Q Right.

A We can only go as far as we can with regulation and statute.

Q And I believe you said once these things become established there is nothing you can do then to eradicate them?

A Probably nothing except to prohibit their spread into

[50]

other drainages in the state. Hopefully in the theoretical situation we could keep them confined into common drainage in New Hampshire.

Q That would be theoretical though, probably?

A Unfortunately.

Q What kind of diseases, disease problems, exist in goldfish?

A In goldfish?

Q Yes.

A I only have just a very general knowledge of that. I'm not specifically familiar with goldfish culture problems. I do know that goldfish are hosts of a wide number of parasites so I have read, but I do not have the specific knowledge.

Q Those are freely imported into the state of Maine, are they not?

A For aquarium purposes.

Q What's to stop one from dumping uranium into a lake just like dumping a bait bale? Is there a law against it which would be enforced if one of our wardens caught them doing it? We certainly allow them into the state of Maine, do we not?

A That's right.

Q I was interested in your statement that we were talking in this particular case of a shipment of 158,000 fish

[51]

and that theoretically, anyway, all it would take would be one male and one female of the same species of another exotic species to get something started in the state of Maine. That would be pretty farfetched, wouldn't it?

A Not necessarily.

Q And I presume that these 158,000 fish plus two eggs, actually male and female, are kept together for a long enough period of time to propagate?

A Right. There is certainly no reason why a shipment couldn't be brought in and placed in an outdoor pond

somewhere and held in which case this could very easily happen.

Q And in this pond these two would have to somehow get together, find each other and do it, right?

A Right.

Q And I would assume that they are not used as bait fish and parceled out in a dozen lots before something gets established?

A Right.

Q Statistically we are not really talking about much of a problem in that kind of an incidence, are we?

A I think that's is a very possible, very strong possiblity.

Q Placing a shipment of bait fish in an outdoor pond and leaving them there for a significant amount of time. So

[51]

statistically speaking we are willing to deprive a person of a livelihood?

A Yes.

MR. HOWARD: I would like to object to the form of the question. I don't think there is any evidence that Mr. Taylor's livelihood is threatened by this need. If his livelihood is threatened by the prohibition against bait fish it was illegal for him to have gotten into the bait fish business in the first place.

THE COURT: Mr. Eggert?

MR. EGGERT: I will establish with further testiony that Mr. Taylor is in the bait fish business as he has been in the business; his demand has been growing over the years; and that he cannot fill that at all times with locally grown bait fish; and it is harmful to his business to not be able to import bait fish.

THE COURT: I will permit the question subject to later foundation.

MR. EGGERT: Thank you, your Honor.

BY MR. EGGERT:

Q you mentioned that in part of your duties -- maybe as not part of your official duties -- maybe it's in your part-time duties that you are a columnist for several newspapers.

A Right.

[53]

Q Do you write that column as an employee of the state of Maine?

A No. Well, I do write a quarterly fly tying column in the Department magazine, Maine Fish and Wildlife, but I also write on my own time as an independent freelance writer for other commercial publications.

Q So, the views you express in those columns were not the State of Maine?

A That would be correct unless I were reporting on someone else's views.

Q Who was it that conducted the fish survey that you were relying on to say that?

A The original fish parasite survey?

Q Yes.

A Doctor Marvin V. Myer.

Q When was that done?

A I don't know. I couldn't give you the exact date. I presume the 1950s.

Q And that law was passed -- I will represent to you it was passed in 1959.

A That would be the approximate time frame.

Q And so this law was passed at a time in which the fish survey indicated

there were no pathogen problems with Maine fish?

A I couldn't say there were no pathogen problems. We have

[54]

our own endemic or native diseases and parasites some of which are quite serious and some which probably have been introduced here at some point in time.

Q Is it fair to say, however, that you are now trying to justify this prohibition by citing problems that didn't exist in 1959; is that not correct?

A I guess I don't understand your question.

Q Well, this law was passed in 1959 and now the State of Maine's position is that the law is on the books in order

to prevent various problems that could occur from the importation of fish. Is that not a fair statement of what we're here today for?

A I guess that would be correct.

Q And do you have any idea when the parasite Pleistoplora was first discovered?

A No, sir, I don't.

Q The Asian tapeworm?

A When it was first discovered?

Q Yes.

A I do know when it was first discovered to be present in the United States.

Q 1977 would be a fair statement?

A No. It was way before that.

Q How far before that?

A I just understand by word of mouth from colleagues that

[55]

it began to show up in the late 1960s.

Q And it's your understanding that the Asian tapeworm was probably imported when grass carp was imported from Asia?

A That's what I had been told.

Q It would be your understanding that the Asian carp was first imported in the middle 1970s?

A No. I believe it was the middle 1960s.

Q Is it not fair to say that there are many bait farms in the country in which the Asian tapeworm does not exist as a problem?

A I presume that there are many.

Q Every golden shiner doesn't have an Asian tapeworm in it, does it?

A No, that's correct.

Q And you could easily get a shipment of golden shiners that did not have Asian tapeworm?

A You could easily obtain one.

Q Yes.

A From word of mouth from colleagues in the southeast I understand that virtually all of the minnow farms in this area do have the Asian tapeworm. I would then assume that in order to obtain a shipment guaranteed free of Asian tapeworm we would probably have to look completely at a different geographical location.

[56]

Q Wouldn't it be fair to say that all of these problems that you are talking about are really hatchery problems rather than wild problems?

A I do not know of studies which prove or disprove all of these -- the impact of these -- in the wild. I can only assume that with that lack of evidence that there may be problems. I do not know for sure.

Q There may not be problems?

A There may not be problems.

Q In fact, it's highly unlikely that Pleistoplora will ever exist in the wild, is it not?

A I do not know that.

Q Are there not many other types of tapeworm that exist in fish?

A There are a wide variety of tapeworms. Some are obviously harmful to their hosts and many are not.

Q And a number of them do the same thing that the Asian tapeworm does as you described it?

A I am not aware of any that outgrow its hosts and totally plug off the intestine as this one does.

Q Where has that phenomenon been reported?

A In Arkansas by the laboratory at Stuttgart, Arkansas.

Q Is that in a journal somewhere that you know of?

A I do not know for sure. I have had extensive research contact with the researchers there. I also have copies

[57]

of photographs documenting this.

Q You say that the Asian tapeworm is not host-specific. Is that an unlimited statement?

A No, sir. I do not know all of the species that it may attack. I do know from a qualified parasitologist

in the southeast that as far as he knows there seems to be no host specificity.

Q Is it not true that several experiments of trying to introduce the Asian tapeworm in the Salmonid is in a way been unsuccessful?

A I am not aware of it.

Q Are you aware that an Asian tapeworm has existed in Europe for many more years than it has in the United States and it has existed in grass carp and it has not affected in other species of fish in Europe?

A I am not aware of that.

Q It is possible to get a license in the state of Maine to sell commercially grown or imported fish, is it not?

A That's correct.

Q And all you have to do is apply to the Commissioner and pay a fee of $17?

A Right.

Q Is it possible to get that license for selling golden shiners?

A For commercially grown golden shiners or --

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Q Or imported.

A Not for imported. That is specifically forbidden by law. For commercially grown golden shiners that is certainly possible.

Q I would show you a copy of a license that has been marked as Defendant's Exhibit Number One. And I don't know how familiar you are with these licenses, but perhaps you can help me. Is that the form of a license one would get if one were applying or had

been granted a license to sell commercially grown and imported fish?

A I have no -- nothing to do whatsoever with the administration of these. And quite frankly I wouldn't feel qualified to even comment on that.

Q Have you checked licenses as you have gone around?

A No. That's not part of my job.

Q Who would I have to ask to know about that?

A I would presume either a game warden or my boss David Locke would be the one to talk with. He's the one who administers the fish culture license, the fish shelling license. Big dealer's licenses are issued by our licensing divilsion.

Q Would Mr. Marsh be able to help me with that?

A Probably.

Q This law prohibiting the importation of bait fish was

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passed in 1959. Maybe you have no knowledge of this, but would you assume that importation of bait fish was allowed before that?

A If the law did not exist then certainly it must have been.

Q And this law as it presently exists applies to all bait fish, does it not?

A I believe that's the way it's worded.

Q And we've talked mostly about golden shiners here today. And it's fair to assume, is it not, that that's because golden shiners at least are widely raised for bait fish and probably predominant in the industry?

A That's right.

Q Are there any other bait fish that you would feel safe that are native to the state of Maine and would say you would feel safe in allowing into the state of Maine?

A No, probably not. Mainly for the reason of danger of importing non-native fish species accidentally along with those.

Q Don't you have those same dangers when you are bringing in eggs and whatever from trout farms?

A No, sir.

Q Why?

A Because those eggs are taken directly from the fish, specifically from the fish, and there is no likelihood

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whatsoever of cross-contamination from a live fish being shipped in

there. There is some danger, but certainly very little as comparing salmon or trout grown in a confined raceway and fish extensively farmed in the surface waters.

Q What if I had a bait farm and I'm interested in raising only golden shiners and in doing that I build ponds and that I carefully select only golden shiners as brood stock. Why do you think that the experience there would be any different than in the trout farm?

A It probably wouldn't be if that were done religiously.

Q So, then we could safely say from that pond we could bring in only golden shiners in the State of Maine?

A Under those circumstances it may be possible, yes.

Q It might be possible. It is possible, is it not?

A Possible in what regard? It's for --

Q It's just as likely that I would bring in only golden shiners as the trout fishery people would bring in only trout?

A Under those circumstances, yes, provided that they were brought from one source directly to the state source and not through an intermediate.

Q That would be a fair regulation, wouldn't it, if we could get a certification from the source that these fish could be imported directly into the state of Maine?

[61]

A If it were possible, yes, sir.

Q At least a good fish and game -- the fisheries people and a good many other states must think it's possible; is that fair to say?

A I can't answer for them.

Q Well, they regulate rather than prohibit.

A In many instances.

Q And they require certification to be free of diseases which would be harmful to the environment and do not allow exotic species and yet they do allow the importation of golden shiners and most bait fish in those states?

A Apparently.

Q The only fair conclusion anybody can draw from that is that it's possible to do it?

A Under the circumstances I cannot answer for their environment, their fish communities and their disease populations that may already be present. I do know what we have in Maine and what our dangers are, what our risks are.

Q Do you think that the fisheries people in other states are interested in preserving the fisheries populations in their own states?

A I would hope so. I have my doubts about certain states.

Q And without talking about the specific problems that you

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want to identify at this particular stage, they may have some problems that are not or not have problems that exist already in the state of

Maine. They may not want Maine problems to come in there, but they have put into effect regulations that would allow Maine fish to be imported if they could be certified?

A Apparently so.

Q To read you a quote that states, "In lieu of these facts, we can't help asking why we should spend our money in Arkansas when it is far better spent at home. It is very clear that much more can be done here in Maine to provide our support in Maine with safe home grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states."

Is that something that you've said in the past?

A Yes, it is.

Q Is that the official position of the department of Inland Fisheries?

A I believe at the time it was written it was.

MR. EGGERT: No further questions.

THE COURT: Mr. Howard, redirect?

MR. HOWARD: Nothing further, your Honor.

THE COURT: The witness may step down. Thank you.

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The Cout will take a 10-minute recess at this point, counsel, and reconvene at 11:25.

(Recess taken at 11:15 and reconvened at 11:25 A.M.)

THE COURT: Mr. Terrison?

MR. TERRISON: Thank you, your Honor. The next witness that the proponents will call is Doctor Harry W. Everhart.

THE COURT: Mr. Everhart, will you come forward?

WHEREUPON

DOCTOR W. HARRY EVERHARD, was called as a witness on behalf of the plaintiff, and having been duly sworn by Deputy Clerk, was examined and testified.

BY THE CLERK:

Q Be seated. Would you state your name and spell your last name for the record?

A W. Harry Everhart, E-V-E-R-H-A-R-T; address, Post Office Box 488, Naples, Maine.

DIRECT EXAMINATION

BY MR. TERRISON:

Q Doctor Everhart, what's your professional background?

A Well, I have been a professor and head of a state agency for fisheries and a consultant with Bangor Hydro.

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Q And that I'm assuming is a background of your entire profession?

A Well, it was pretty quick, but generally interested in the fishery management and the protection of specifically that resource.

Q Do I understand correctly that you received a Bachelor of Science degree in zoology?

A Yes.

Q And also after you received a Masters degree, is that correct?

A At the University of Pittsburgh.

Q And what was that in?

A In comparison anatomy and embryology.

Q And also you later received a PhD degree, is that correct?

A Yes.

Q And when was that?

A From Cornell University in 1948.

Q And what were your doctoral duties in?

A My studies were management problems with smallmouth bass in the Finger Lakes in New York.

Q And the result of your education was that you were preparing yourself to become involved in the academic community involving fisheries and fish management?

A Not just the academic community. I was interested in

[65]

working with the state organization where you actually had to practice

what you had been preaching in the classroom.

Q And as a result of your education did you indeed teach and become involved with further academic pursuits?

A Yes. At the University of Maine when I was Chief of the Fishery Division in the state fish and wildlife and concurrently a professor in zoology at the University of Maine.

Q And how long were you at the University of Maine?

A Nineteen years.

Q And during that time I understand you were both a zoology professor and also Chief of the Fisheries for the Maine Department of Inland fisheries and Game?

A Well, I taught the fishery courses, fishery management and etiology.

Q And simultaneously you were Chief of Fisheries for Maine?

A Yes.

Q And when did you leave the State of Maine?

A In 1967.

Q And I understand that you went to Colorado State University?

A Yes, at Fort Collins.

Q And what was your position there at that time?

A I was Chairman of the Fishery Department and also taught

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fishery management.

Q And how long were you Colorado State at Fort Collins?

A Five years.

Q And in 1972 you went to Cornell?

A Cornell.

Q And what was your position at Cornell?

A I was Chairman of the Department of Natural Resources and professor.

Q And I take it that that department included fisheries among other natural resources type pursuits?

A Fish, wildlife, forestry recreation, land use.

Q And how long were you with Cornell?

A Ten years.

Q And you returned to Maine in 1982, is that correct?

A In December.

Q During your tenure here in Maine this particular statute about which you have heard some testimony was enacted, is that correct?

A Yes. I think it was in the 1950s.

Q And do you have any knowledge as to at the time of what occurred in 1959

or whenever in the 1950s as to what was it that prompted this particular statute at least at that time?

A Yes. I think the thing that prompted this was the major food and staples up to almost 100 percent of our

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landlocked salmon is smelt. And it's pretty well understood that you are not going to grow any landlocked salmon if you don't have smelt. And at the time New Hampshire -- they were importing smelt from New Hampshire into Maine. And they had a parasite disease. I wrote it out because I was afraid the young lady was going to ask. It's glugeahertwigi, G-L-U-G-A-H-E-R-T-W-I-G-I.

Q So, the concern at the time was a

parasite in connection with landlocked salmon?

A And specifically in this case with smelt.

Q And now during your association in the state of Maine both at the University and as Chief of Fisheries with the Maine Department of Inland Fisheries and Game, did you become familiar with the environment for fish population here in Maine?

A Yes. I spent the summers, spent the week -- a week or 10 days with each of the fishery biologists so that I knew the fisheries down in this area down clear to Fort Kent and that area and supervised research projects in the division with cold water fish and some of the warm water fish.

Q And did you undertake any other

source of research projects during that time?

A Yes. We had one particular one that we had with the

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National Science Foundation on strains or races of brook trout that we were interested in in testing brook trout that we could adapt to different areas more easily.

Q And as a result of that study, research and general association with the environment for fish populations in Maine did you establish an opinion as to the quality of that particular environment?

A Yes, I certainly did.

Q What is that opinion?

A We have a very high quality fishery and that's why we are so concerned

about protecting it, landlocked salmon. There is no other state in our 50 states that has any real landlocked salmon fishing. You come to Maine for that or you live in Maine for that. The brook trout in Maine, the lake trout in Maine -- these are all high quality cold water game fish.

Now, we also have smallmouth bass, some largemouth bass and excellent fisheries for these. And one of the concerns would be for the Salmonids, particularly -- we have these beautiful clear water lakes which it also is one way at least to clear of saying that these lakes aren't as productive where some of these bait fish are coming from. Work that we did in this state and as is still going on would indicate

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that a market of little over a pound of landlocked salmon would be fine in some of our lakes; so that we are dealing with a limited productivity and any introduction of a competitor in any way would be enough to upset the ecosystem or the total environment.

Q Now, you've testified that you were familiar with that environment. Have you become familiar during the course of your career with environments, specifically fish environments, in other areas of the country?

A Yes, certainly in Colorado and, well, an interesting situation there was, of course, it was hard for me when I first went to Colorado to hear people talk about reclaiming ponds because

they had hunted brook trout in them. Well, what they were doing with brook trout were stunning in these cold mountain lakes but they were also competing with their trout which was their native species. It's a good example when you introduce species that are non-native and non-specific and they take over.

Q Would it be generally fair to say that your opinion for the environment for fish in Maine for the special fish that you've mentioned, the landllocked salmon particularly, makes Maine somewhat unique in its position vis a vis the other 49 states?

A I think so. We have over 274,000 licenses sold each

[70]

year plus another 115,000 juveniles that don't have to purchase licenses. That was a survey done at the University of Maine, the co-op unit there.

So we are dealing with a vast audience of people who are attracted to Maine for the fishing and for the kind of fishing we have. We have the recreation industry and we also have tourist industry that depends on these sources.

Q Now, in your studies you have -- and correct me if I'm wrong -- generally become an authority in the field of the introduction of non-native species into a new environment; is that fair to say?

A I don't think I am an authority, but I am certainly opposed to it as many biologists would be. I can't imagine that anyone would just say I am in favor of introduction of exotics. We have too many examples that have been mentioned today, the carp, the alewives and others.

Q But during your career you have studies this when non-native species are introduced?

A Well, when you are studying in competition of fish population or things like that.

Q What is so bad about the introduction of the new strains or species or what have you into an existing fish population? What are the harms?

[71]

A Well, I think you used the word species and I think that's one of the

things we have got hung up maybe on here. Species is not a definitive classification. It's a very high level of classification, and so we have subspecies and we have races and we prefer to have our fishery workers use stock. So I think progressive biologists today and fishery managers are not thinking of just brook trout, they are not thinking of bass, but we are thinking about the strains of bass we know that fish are different from the southern part of the United States into the northern part of their distribution. And I remember when I came to Maine some of the minnows didn't look quite the same. And I have been warned about this by my professors at Cornell. So we have to be very careful that we don't

introduce a strain or a race of some exotic non-native fish that is going to compete with our native fish.

Q Well, you've identified one harm. What does this competition do?

A It of course means that they both want to use the same resource. I have already referred to the low productivity of our lakes. So we have competition for food, (a) and that would be for insects. In a spawning area there might be competition for that or you might introduce something that would actually prey on the fish.

[72]

We have had the introduction of the salamander into the Belgrade Lakes. People here call it a lizard, but it's the sort of thing that can be

introduced in the area and once it's here you can't get rid of these.

Q Now, you've identified what you have hesitated to call a lizard.

A It's the salamander. I want to quote the fisherman on these. They won't touch them, of course.

Q Can you explain this in a little bit more detail? What occurred specifically that you are aware of with respect to the salamander?

A What occurred was that it was introduced for a research project. The local university which will remain nameless -- it wasn't the University of Maine, of course -- but by a researcher and during a flooding of the area he had it in these animals and were released and they spread then in on a very important area of the state, the Belgrades.

Q And so what?

A So, we have got another competitor for food; we have another competitor for space. We have another predator not competitor but predator which is a very important part of the fisheries in those lakes.

Q And is it possible for that type of organism to become involved in shipments of fish grown in these ponds that

[73]

we have heard about?

A These ponds that we have heard about are likely to have crayfish in them. So you can get a crayfish introduced. You could have insects introduced. More importantly, you could have fish eggs introduced that would be very difficult to screen

out. You can have larvae fish that probably no one can identify they are so little. That may not be true, but most of us couldn't and it's just unbelievable to me to think that you can raise fish in outdoor dirt ponds in this kind of an environment and not have other fish introduced along with them. You'd have to know what the water supply is. You see he can't tell. I don't know what the water supply is. If the water is running in from a natural area, then you are very likely to get contamination all the time. You say I put a fish screen in. I say the fish screen won't screen out the tiny fish in there. The fish are dumped in a truck and sometimes sorted and sometimes not. And we have heard the

size of these shipments here this morning. And I guess they wouldn't be big ones particularly, so it would be very easy to overlook one of these introductions. And I don't mean one or two fish; I mean the sizable amounts so we end up with croppings in Sebago Lake, the most famous salmon lake in the world. Green sunfish have been mentioned here;

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sunfish particularly when I was here in the state we prevented the fish and wildlife service from introducing blue gills and other sunfish that we don't need in the state; didn't need and still don't.

Now, there is nothing wrong with these fish down in the south where they refer to the blue gill fish or

these other kind of fish. But up here at least in our opinion we are more fortunate that we have these Salmonids and fishes of that kind.

Q Now, you spoke about the salamander. I take it that would be one other organism; it's not a fish but might be included in a shipment like this; is that correct?

A It's an example of a lot of things that could be put in a shipment that could be in these ponds. I don't have any definite contact or information on this, but what we are talking about here is a gamble in the sense. I'm not willing to gamble that these things won't happen or because some other state doesn't have a regulation or doesn't have a tight one or because something has already

happened that it's an excuse for letting it go on or not handling it. We have too much at stake in Maine; it's too big a part of our state.

Q Now, I want to turn for a moment, if I could, to screening techniques or any kind of inspection technique

[75]

that might be employed to prevent the kinds of importation and harms that you've identified.

You've already testified that some fish can be very small and not visible; is that correct?

A Well, not easily visible in a shipment or the eggs.

Q Would it be possible in your professional opinion to screen any shipment of bait fish in order to totally prevent the kind of harms or

introduction of non-native species and the results that are from that in which you've testified?

A I think that it's possible, but I think it would be very unlikely that this would happen. This is a business. You have living material that you have to move; you can't hold them in tanks and this kind of thing for any length of time. Also, when I talk about strains and races I'm not talking about characteristics you can necessarily see easily. I'm talking about behavior. So I wouldn't know if I looked in a tank of fish if it's supposed to have Emerald shiners in it or Golden shiners. I couldn't tell you what the strain or habits of that fish was without a lot of examination and study of it.

Now, with the brook trout in maine we learned -- I can say that even though I have been here for awhile -- but we learned about the different spawning types

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of these fish. Some would go to the inland; some spawned under the rise; some did other characteristics. With the brook trout we chose them for color, again for growth and this kind of thing.

Now, those are not at a species level. Those are racial strains that we can appreciate. Now, there is one species now you look around and have which is a shining example of the dog problem and with their spawning how many different kinds of dogs would you see. Do you get one species and

the same with other organisms that we have learned to adapt, and this is in the forefront of fishing management.

As I say, I mentioned the Cutthroat trout. Some Cutthroat trout feed at the lower parts of the lake; some at the surface. There are these kinds of behaviors. As have been pointed earlier there haven't been these kinds of studies done with the bait fish and minnows; may be a lot of work on the diseases but not on these behaviors.

Q I want to direct your attention, if I may, to the egg situation. We have talked about screening and its problems with respect to living fish. Do you have any familiarity or opinion with regard to the egg

situation; whether it would be known or whether one could certify that a certain shipment of eggs may be free of

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non-native species?

A I believe you could get a certification, but I wouldn't put much stock in it. You have got eggs in there. You can get them out, of course. That's the way we collect them in there. That's the way we get eggs. Again you have a large shipment in there. You are in there with nets doing all these things. You'd have to be right down at the source. You have to make sure you were dealing with a strain or it wouldn't have any peculiar habits. It would compete up here but not only

with the specific situation but with other populations. It might stunt. That would have to happen with some of the sunfish. It would just not grow to a large size. They grow very slowly.

I have already mentioned they wouldn't be attractive to most people in Maine as fishing. They may be to kids, but --

MR. TERRISON: May I have a moment, your Honor?

THE COURT: Yes.

MR. TERRISON: I have no further questions at this time.

THE COURT: Cross-examination, Mr. Eggert?

CROSS EXAMINATION

BY MR. EGGERT:

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Q Good morning Doctor Everhart. I'd

like to read to you a part of a statute that exists in Maine. I don't know if you have been aware of it before this or not, but it is titled "Permit to Import Live Freshwater Fish or Eggs". Are you aware in general?

A When you mentioned it earlier.

Q So, you are aware that Maine does allow the importation of live freshwater fish into the state of Maine?

A Yes.

Q And this statute goes on further to require that there be a statement from among other people the United States Fish and Wildlife Service certifying that these fish are free from certain diseases. Would you not accept the statement of the United

States Fish and Wildlife Service certifying fish as being free of certain diseases as being authoritative or trustworthy?

MR. TERRISON: I'm going to object, your Honor, for the reason that Doctor Everhart has talked about non-native species and hasn't really discussed in direct examination diseases.

THE COURT: Mr. Eggert?

MR. EGGERT: Well, what I'm getting at, your Honor, is he's saying that there could possibily be a certification of a shipment of bait fish but he wouldn't put much stock in it. I'm trying to establish the

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credibility or the trustworthiness of the United States Fish and Wildlife Service that does stock bait fish in Carolina and

it's one of the best of its kind. I think the test of this objection is that his testimony was limited to exotic races of strains and rather than species and therefore the shipment that he made would have been related to the presence of other stains in a shipment.

THE COURT: I will sustain the objection. If you want to rephrase your question in terms of the direct testimony so be it.

BY MR. EGGERT:

Q Do you know of any requirement in the state of Maine that a person cannot import exotic species in the state of Maine other than the bait fish statute?

A They referred to one this morning I suppose; that's one for goldfish or exotic fish, but that doesn't mean

that I am in favor of it or that I think that you haven't done a good job of pointing out the problems. But I'm not willing to gamble just because we have those exceptions in those kinds of laws to not do everything possible which is what the State is trying to do to not have any more of this and to control it as well as the state can.

Q But the fact of the matter is, is it not, is that the state of Maine does allow the importation and not just

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the examples of the tropical fish but does allow the importation of live freshwater fish, right?

A Yes, but the fact of the matter is that that doesn't make it right.

Q It's the law.

A That doesn't make it right to challenge the other because it's not doing its job.

Q We will get further here if you will answer the questions. And there is nothing in there regarding permission to import live freshwater fish which restrict that to native species; is that not fair to say?

A Yes, it's fair to say. But are you asking me if it's right or not?

Q No, I'm not asking you -- that's what the position of the state is, in fact and, in fact, it's your experience that you know that this state has imported, acting as the State of Maine, several non-native species for introduction into the state of Maine, is that true?

A Yes, I know that. But I didn't agree with that necessarily. That's the point that I would want to make.

Q And do you consider all introductions of non-native species into a state to be harmful?

A I consider them very dangerous to do this unless you have done a complete ecological study of the species

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and its habitat; unless you fairly carefully control what it might do in your environment; otherwise, you know the literature is full of a lot of examples.

Q You haven't agreed with what the State of Maine has done in the past 20 years then, have you?

A Well, I don't know whether I have or not. We are just talking about one problem.

Q Haven't there been many introductions of salmon in Maine now?

A Those were a few years ago.

Q Rainbow trout?

A I don't know when rainbow trout was introduced; in the late 1800s down in Branch Lake.

Q And, in face, Mr. Walker said that there are over 100 species that have been introduced in the state of Maine over a period of time.

A That was after the last glacial period which was quite a long period of time; there were 39 species here.

Q I believe he limited that to a long period of time within a certain period. There have been a large number of species introduced in the state of Maine?

A If you want to go back into the 1800s, yes.

Q He said seven in the last seven years.

A Well, that's true. That's true, smuggled in with big shipments and that kind of thing. It's very difficult

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to stop this kind of thing. That's why you do everything you can; and that's what this law was intended to do. You recognize the problem. Some of these things are done by people --

THE COURT: Excuse me, doctor. You should just answer the question of counsel. If your counsel wants to ask you on redirect --

THE WITNESS: I know. I have been a professor too long.

BY MR. EGGERT:

Q What has been the negative impact of the introduction of rainbow trout in the state of Maine?

A Oh, the negative impact is that these are the similar fish they are west coast fish. They were introduced. Primarily they are an easy fish to have in the hatchery. Their history is well-known. The impact would be that they occupy just about the same environment as a landlocked salmon; temperature requirements are the same and I believe the state does not have a program in rainbow trout fishing at this time.

Q They allow stocking of rainbow Trout, do they not, through private hatcheries?

A I don't know that through the state of Maine, but I guess through private hatcheries. I do not know that.

Q What you were talking about when you were talking about

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comparing these different kinds of species is a value judgment that you're making, is it not?

A No. I think it's based on a large amount of fishery literature which talks about the impact of various strains, races, subspecies. So you can't talk about introducing rainbow trout; that's the point.

Q If I have a pond in southern Maine -- not that I own -- but there is a pond in southern Maine that has in it predominantly trout, and largemouth bass is introduced into it that

drives out the trout, not everybody is going to think that that's bad, are they?

A Not the largemouth bass fisherman probably.

Q But it's a value judgment as to who is right?

A No. We are talking about a state resource here and a large industry and a lot of people and it's different than a individual fisherman.

Q Well, the bass industry is a large industry, is it not?

A It certainly is along with the white perch.

Q And, in fact, I read the statute, the state of Maine has bass now in the state of Maine?

A I would be very much opposed to introducing largemouth bass from the

southern part of this country where they recognize different species or smallmouth bass from another area which could bring in a strain maybe resistant to a disease or parasite in its own

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environment but not in the state of Maine. This isn't just a value judgment. Obviously I have a strong opinion.

Q When the state of Maine and the private hatcheries and whoever else bring trout, eggs, into hatcheries into the state of Maine for raising do they have to be certified to be free of all other foreign materials such as you've described like occur in bait fish shipments?

A I don't know.

Q So, it's just as conceivable that those shipments may bring some of these unwanted species into the state of Maine, is it not?

A Except that these are inspected as I understand it before the individual can get the permit.

Q You just told me you couldn't inspect for those types of problems in bait fish. How can you do it for trout or Salmonids and not for bait fish?

A For some of the reqsons Mr. Walker gave.

Q What it really boils down to is that the State of Maine and you support the spawning and are not interested in doing that; they don't want to do that and it's much easier to prohibit it?

A What we want to do is to protect the resource that we have; that's what we want to do.

[85]

Q Okay. Then why can't -- if we can inspect the batch of Salmonids and say that that contains no exotic species of any kind be they fish or salamander or lizards, why can't we make the same certification for the shipment of bait fish?

A For the one thing, your shipment of bait fish are not brought in by professionals in most cases.

Q Can I ask you what you base that statement on?

A Knowing the technicians that work around these fish cultural stations and the truck drivers and these kind of people.

Q You mean to tell me that your contention is that the bait dealers in Arkansas -- and I'm referring to just one specific person here -- the Anderson Bait Distributors which raises two million pounds of fish per year in modern facilities -- is not a professional?

A You understand you are pushing me out of my specialty if you want to continue this.

Q I realize that.

A If you want to come back to something that I can answer; that would be a value judgment in my opinion.

Q You really have no experience with the bait industry is what you are saying?

A Just briefly.

Q So, you really don't know whether the bait industry can

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provide satisfiable clean shipments of golden shiners?

A Are you asking the question about diseases or are you asking whether the shipment will cause problems?

Q I'm asking whether or not you know that a bait distributor in Arkansas can provide shipments of golden shiners without exotic species in them? What would be considered exotic species to the state of Maine?

A All right. And I have not visited their operations. All I am saying in my opinion and experience is it's unlikely that they are going to be able to sort out eggs or larvae and there won't be other identical organisms in it.

MR. TERRISON: Excuse me, your Honor. I'm going to object.

THE COURT: Let the witness finish the question.

THE WITNESS: No. Again, we come back to strains, races, subspecies. There is no way to tell that without a lot of research. I don't know what they spread into these fish if they are using food stock and there is something you can't certify by looking into a truck or counting or doing things like that.

BY MR. EGGERT:

Q How do you determine those things from the eggs of

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trout?

A By hatching them and by knowing where you got the brood stock; whether you got it from a slow growing strain or

for some reason because maybe you liked where they spawned or whether you got it from a strain that grew faster; whether you got it from a strain that lived longer. These are things you can't tell by looking at the animal. You only can tell by working with it and watching its behavior.

Q Those are things you hvae learned through behavior and experiences?

A I have learned it through research and experience and by reading the literature.

Q And are there not people of your equivalent credential who are working with bait fish and golden shiners that may know as much about bait fish as you know about trout?

A I suppose that is possible. We have researchers at the southern

universities. I mentioned we had a researcher at Colorado State.

Q And couldn't they make the same statements about bait fish with the same certainty that you make about trout being imported?

A I think they can make the same statements that I made about races and subspecies and strains; that they must

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recognize they have been --

MR. TERRISON: Objection, your Honor. I see something developing here where the witness is trying to answer and counsel is trying to --

THE COURT: Let me instruct the witness and counsel both. if the witness would try to confine yourself, doctor, to the questions asked and I think

if counsel will await the end of the response before asking the next question we will proceed more efficiently. Was that question answered?

BY MR. EGGERT:

Q And could not those people certify taking those things into consideration with an equal degree of certainty that you can certify trout with?

A They could perhaps if they are equal to the people we have working in trout and salmon. But keep in mind that is a sample. There is not 100 percent probability that these introductions won't happen. And that's the chance or gamble that I wouldn't be able to tak

Q You don't require 100 percent in the trout industry? You're willing to take the gamble there, right?

A No. I thought you were referring to what is happening around the country. No, not to protect the resource that we have here I won't take that chance.

Q If you wanted to be 100 percent sure that nothing ever

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came into the state of Maine that was non-native then you would have to stop all importation of all fish, right?

A Sure.

Q You are not advocating that, are you?

A I am just saying that it's a gamble to bring anything in here. Another fish or whether its diseases is a strain that will compete or a race that will compete.

Q We are willing to bring in Salmonids, tropical fish, goldfish and

unspecified fish in the statute into the state of Maine. Why is that so different from bait fish as far as talking just about exotic species now?

A It's a gamble when you bring them in. That's what I'm saying, just like it is with the bait fish.

Q So, it's unfair, really. So we are going to gamble with a certain kind of people who want to bring in one kind of fish and say we are not going to gamble with a certain kind of people who want to bring in another kind of fish?

A So does that make it right, then?

Q No. I say it makes it wrong.

A So do I because one thing is wrong. If we aren't going to make it better by doing something else. It's equally wrong; that would be my opinion.

Q You agree with me then, do you not, that it's not that

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we should either man the importation of fish or we should allow importation of fish with proper regulation?

A Ideally that would be the thing to do.

MR. EGGERT: Nothing further.

THE COURT: Any redirect, Mr. Terrison?

MR. TERRISON: Yes.

REDIRECT EXAMINATION

BY MR. TERRISON:

Q Just briefly, Doctor Everhart. you have testified that you felt that it's a gamble importing fish because of possible non-native species included, is that correct?

A Yes.

Q Is it more of a gamble with bait fish because of their sizes and amounts then it would be with respect to these so-called Salmonids?

A I'd say yes as the state-of-the-art in the bait business, thr research, the background.

MR. TERRISON: I have no further questions.

THE COURT: Mr. Eggert, any recross?

MR. EGGERT: No, I have nothing.

THE COURT: Thank you. The witness may step down.

(Witness excused.)

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THE COURT: Mr. Terrison, does the government have one more witness?

MR. TERRISON: Yes, your Honor.

THE COURT: How long do you expect the direct examination of that to take?

MR. TERRISON: I would expect maybe 10 minutes.

THE COURT: Fine.

MR. TERRISON: The government calls Doctor John Plumb.

WHEREUPON

JOHN PLUMB, was called as a witness on behalf of the plaintiff, and having been duly sworn by the Deputy Clerk, was examined and testified.

BY THE CLERK:

Q Please take a seat. State your name and spell your last name for the record.

A John Plumb, P-L-U-M-B, Auburn University, Auburn, Alabama.

DIRECT EXAMINATION

BY MR. TERRISON:

Q What's your position at Auburn University at Alabama?

A I am associate professor in the Department of Fisheries and Department of Fish and Aquacultures.

Q And how long have you been employed there?

A I have been in Auburn since 1969.

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Q I want to take you over briefly your prior education before becoming an associate professor at Auburn. I understand that you have received a Bachelor of Science degree in 1960?

A That's correct.

Q And further that you received a Masters degree in 1963?

A That's correct.

Q And what were your studies in each of these degrees?

A In my bachelors degree it was general biology. The masters degree was in zoology with an emphasis on fishery management.

Q And then do I understand correctly that you received a doctoral degree in 1972?

A That's correct.

Q And what was the emphasis placed on your working in your doctorate studies?

A It was in fisheries, however the emphasis was again in fish, health and fish diseases; primarily infectious diseases.

Q And I understand that you have had other professional training in addition to the academic training that you have already stated.

A That's right.

Q And what is that?

A Between 1961 and 1969 I was employed by the U.S. Fish

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and Wildlife Service. During that time I served as a hatchery manager and also as a fishery biologist. Again during that period of time I attended the Fish and Wildlife Service warm water training school in Marion, Alabama and also the fish disease Long course at Leetown, West Virginia.

Q That was the same course that Mr. Walker took?

A Same course.

Q And during the course of your academic profession and career how would you characterize your field in the specialization?

A Primarily involved in infectious diseases, bacterial diseases, viral diseases, diagnostic procedures in diagnosing these various diseases and including the diagnosis of parasitic infections.

Q And this is all in relation to fish?

A Yes.

Q And during the course of your professional training and also I understand as associate professor you teach, is that correct?

A Yes.

Q And during your courses in teaching have you become generally familar with fish diseases?

A Yes.

Q And as a result of that familarity have you also become

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knowledgeable about screening procedures and testing procedures to show the particular diseases in particular fish?

A Yes.

Q And during the course of this special training and teaching have you formed an opinion as to whether or not it is possible to test fish and to certify that any particular fish is virtually free of any particular disease?

A Well, to some degree. If we are speaking in the context of warm water fish, these procedures have not been established. They have not been accepted by professionalized people as procedures which can be accepted to certify certain fish free of certain diseases.

Q And in addition to the fact that they have not been generally accepted is there reason why that's true?

A Well, for one thing many of these bacteria, parasites, exist in many different geographical locations. It's difficult to examine a group of fish and take a subject sample of those fish. If you find a particular disease, organism, a particular parasite then you are assured that that particular organism is present in that population. But if you have, for example, 10,000 fish you look at a hundred of these fish, a particular

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parasite or bacterial organism or pathogen may not be there, and statistically you can show that it is not there based on a percent of

assurance. But still there is always that possibility, particularly with these parasitic organisms that there may be a few fish in that population that have these organisms in which you did not examine.

Q And would that be especially true from a situation such as we have here where there are 156 or 58,000 fish?

A I feel that is true.

MR. TERRISON: I have no further questions of the witness, your Honor.

THE COURT: Thank you, Mr. Terrison. Mr. Eggert, cross-examination?

MR. EGGERT: yes, your Honor.

CROSS-EXAMINATION

BY MR. EGGERT:

Q Good afternoon, Doctor Plumb. As I have with everybody else I would like to start with reading this statute again -- perhaps you have already heard it a couple of times -- with regard to permitting the importation of live freshwater fish or eggs into the state of Maine. And the statute says that the Commissioner may grant such permits to import live freshwater fish upon certain qualifications, and among those is that a statement from

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a recognized fish pathologist, from a college or university, from a state conservation department or from the United States Fish and Wildlife Service, certifying that the fish or eggs are from sources which show no

evidence of viral hemorrhagic septicemia, infectious pancreatic necrosis, infectious hematopoietic necrosis, Myxosomo cerebralis or other diseases which may threaten fish stocks within the State.

I take it you would agree with me that there is a sampling technique that allows the identification of those diseases?

A Yes, there is.

Q Is that 100 percent?

A No.

Q So, the same criteria holds true. You can certify that particular batch of fish that are being imported, but there is always the possibility that some of the fish in the batch have the organism or are carrying the disease?

A It's a possibility, yes.

Q But that is an accepted -- there is an accepted sampling technique, at least these diseases apply essentially to Salmonids, do they not?

A Correct.

Q But those sampling techniques have been accepted even

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though they are not 100 percent?

A That's right.

Q MR. EGGERT: No further questions.

THE COURT: Any redirect, Mr. Terrison?

MR. TERRISON: Yes, your Honor, just briefly.

REDIRECT EXAMINATION

BY MR. TERRISON:

Q Doctor Plumb, you testified on cross-examination about these

techniques that exist for testing of Salmonid fish, is that correct?

A Right.

Q And these are techniques which are accepted techniques, is that correct?

A Yes, they are.

Q Now, with respect to bait fish, however, you've testified that there are no specific accepted techniques in regard to that kind of testing of these kinds of fish?

A That's correct.

Q And therefore that the comparison between the two is sort of apples and oranges, is that correct?

A I think they cannot be applied from one group of fish to another.

MR. TERRISON: No further questions.

THE COURT: Mr. Eggert?

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RECROSS-EXAMINATION

BY MR. EGGERT:

Q Is there not a test that you can determine if a golden shiner has Pleistoplora?

A A very simple test of examining the ovaries either microscopically where you can see the evidence of it or taking sections of the organs and examining under the microscope.

Q Is that a generally accepted technique?

A Yes

Q Is there a technique in which you can test for Capillaria catastomi?

A By examining the fish again microscopically you can see the worm.

Q Generally accepted technique also?

A It is an accepted technique for identifying the organism.

Q I can't say the latin word, the Asian tapeworm; would that apply generally for that as well?

A That's true.

MR. EGGERT: Nothing further.

RE-REDIRECT EXAMINATION

BY MR. TERRISON:

Q Doctor Plumb, on recross-examination you testified about testing techniques, is that correct?

[99]

A Yes.

Q Are these sampling techniques?

A No. They are not sampling techniques.

Q They are different. They are testing and sampling?

A Right.

MR. TERRISON: Nothing further.

RE-RECROSS-EXAMINATION

BY MR. EGGERT:

Q I guess we are getting into what the difference in a mathematical sample with any batch of fish.

A Well, we go back to my original comment concerning, you know, the presence of the organism. Although these techniques have IPN and IHN and the Myxosomo and the viral diseases of trout, those techniques and that statistical analysis procedure was developed for those diseases. There are some questions now really as to the validity of those aspects of it from the people that have been using these procedures for 15 years. I really do not think that it is possible to apply these same certifications or a term which

unfortunately put on to this procedure. I don't think that this can be applied to all groups of fish. We that are involved in warm water fish culture, warm water aquaculture and diseases have really been opposed to applications to these procedures on warm water fish and the examination

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of the fish to diagnose, to identify, the presence of an organism is not the same thing as certifying those fish of being free of a certain disease or pathogen.

Q Are there sampling techniques that you use yourself?

A There are sampling techniques which we use. However, we do not certify a group of fish of being free of

diseases. We can't treat fish like cattle. Cattle you can look at each one of them, each one of them. A fish you can't look at each one, because if you do you end up with none. So, we have to look at a certain number of fish which is economically feasible and within the time constraints and limitations that one has, and when we look at a group of fish to see if a disease is present or a parasite is present or is not we will specify that these 10 fish, these 50 fish or these 100 fish did not have that disease. And since there are no acceptable criteria for accepting this or proving it then that's the way it has to go. And if a state will accept that qualified statement then that's their

responsibility or if it's a private individual.

Q That's true across the gambit of all fish?

A Well, in a sense, yes.

MR. EGGERT: Nothing further.

MR. TERRISON: Nothing further.

THE COURT: Thank you. The witness may

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step down.

(Witness excused.)

THE COURT: Counsel, it is now 12:30. Has the government's case almost completed, Mr. Howard?

MR. HOWARD: Yes, sir. Both the state and the government rest.

THE COURT: Thank you very much. Before then we hear the defendant's case the Court will stand in recess for the lunch hour. It is now 12:30. Court will reconvene at 1:45. Thank you very much.

(Whereupon Court recessed at 12:30 P.M. and reconvened at 1:45 P.M.)

THE COURT: Good afternoon, counsel. (All counsel responded "Afternoon, your Honor.")

MR. Eggert, does the defense have an opening statement?

MR. EGGERT: Yes, your Honor, just briefly. We would agree at least in small part with what the state has said in its opening statement, and that is that the burden is upon the State of Maine to show that there is a legitimate threat posed to the fish population of the state

of Maine that they are trying to deal with with this prohibition which on its face violates the commerce clause of the United States Constitution. They must further show that these problems cannot be dealt with in any other less

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discriminatory fashion.

We will present some evidence this afternoon -- I don't anticipate being very long -- basically to show that through a man who's had a longstanding experience with the bait industry and the golden shiners in particular that the problems of disease have been raised by the state, are really not serious problems at all, and that even if they are problems that the state feels they must work against that they certainly can be controlled through regulation rather than outright prohibition.

We will also present the defendant himself to testify briefly about the business aspect of the bait industry that he's involved in and also the significance of the bait industry on a nation-wide basis.

I would remind the Court -- it's my reading of the law anyway -- that the standard of review of this Court is that of strict scrutiny which I have not been able to find a clear definition of. Evidently it does not mean that the state must prove beyond a reasonable doubt, but they certainly must prove to a degree of certainty a mere preponderance of the evidence. And I feel that when all the evidence is closed here that the state will not have met that burden.

And I will call Doctor Robert Summerfelt.

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THE COURT: Mr. Summerfelt, come forward

WHEREUPON

Doctor Robert C. Summerfelt, was called as a witness on behalf of the defendant, and having been duly sworn by the Deputy Clerk, was examined and testified.

BY THE CLERK:

Q Please have a seat. Would you state your name and spell your last name for the record?

A Robert C. Summerfelt,

S-U-M-M-E-R-F-E-L-T.

DIRECT EXAMINATION

BY MR. EGGERT:

Q Good afternoon, Doctor Summerfelt. Would you briefly tell us what your present position of employment is?

A I am Chairman of the Department of Animal Encology at Iowa State University.

Q And what basically are your duties in that position?

A Well, I am administrative officer for the faculty and direct the undergraduate and graduate department including its graduate curriculum and major. And I am also a teaching professor and directly each graduate students on my own.

Q Is that all related to the fisheries industry?

A No. It's not all related to the fisheries industry?

Q Is a part of your duties having to do with specifically the research? Have you done research in the area of

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fisheries?

A Yes, I have.

Q And has that been fairly extensive?

A Well, I have been working in the fisheries field since 1957 as a graduate student when I began my graduate study at Southern Illinios University doing research as a graduate student on fisheries related problems.

Q Why don't you outline for us what your academic career, your educational experience has been?

A Well, I have a Bachelor of Science degree in biology from the University of Wisconsin, Stevens Point; a Masters and PhD from Southern Illinois University. And I have received my PhD in 1964.

Q What were your major topics or areas of study in that?

A My PhD was major in zoology with a minor in microbiology. For my doctoral dissertation I dealt with the identification by use of electrophoresis of the serum proteins components in fish that has an antibody activity, and specifically I dealt with bacterial pathogen of fish by the name of Aeromonas liqurfaciens,
A-E-R-O-M-O-N-A-S-L-I-Q-U-R-F-A-C-I-E-N-S. The name of the species has subsequently been changed to Aeromonas hydrophlia,
H-Y-D-R-O-P-H-L-I-A.

Q The fish that was used in this research was a golden shiner?

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A Yes, it was.

Q And you have retained since that time a continuing interest in the golden shiner, have you not?

A Worked in the golden shiner since 1959.

Q And what have been briefly some of the results of that research that you hve done on the golden shiner?

A Well, in addition to being the first to describe the serum protein component in the golden shiners that have antibody activity I demonstrated that one can prepare a bacterial bacterium as it's called, an antigen, that could be injected in golden shiners and produce antibodies in the fish that would be resistant to pathogens, that pathogen. I

described two species of parasites in the golden shiner, Pleistoplora ovariae and a parasite by the name of Myxobolus notimigoni spelled Myxobolus, M-X-Y-O-B-O-L-U-S; notimigoni, N-O-T-I-M-I-G-O-N-I.

Q As part of your research I take it you have done a good many of the types of procedures that a fish pathologist would do?

A Yes, I think so.

Q You are not, however, a certified fish pathologist?

A That's right, I am not.

Q And could you explain why that is that you are not a certified fish pathologist?

A By certification it means that you are capable of

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identifying a specific list of pathogens and the organisms. The only organisms that are required for certification are organisms that I do not deal with. They are pathogens of salamonids.

Q And I believe I have heard those referred to in the literature. You have told me that these are considered to be reportable diseases?

A Right. That's correct.

Q And are any of the diseases of the golden shiner that we have talked about here today, meaning the Pleistoplora ovariae, the Capillaria catastomi and the Asian tapeworm, are those reportable diseases?

A They are not on the list by Fish and Wildlife Services or by the Fish

Health Services as reportable diseases.

Q Could you explain to us what is meant in general by a reportable disease?

A It's a disease which is contagious for which there is no known cure or for which an importation would result in very serious impact in the fishery resources of that area and it's certainly somewhat subjective. The fish health specialists have argued -- I have been on fish health committees -- have argued over what organisms to put on that list. And that's very debatable. There tends to be a listing of organisms that occur in all the organisms that occur in Salamonids. And I have been

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on committees where we have discussed the pros and cons of various

organisms that occur in warm water fish; and they have not been felt to be of the magnitude to develop a reportabe list.

Q Let's talk specifically about some of the organisms that have been talked about here already today. You mentioned that you were the first to identify and isolate these. When did you first isolate that organism?

A The paper was published in 1964, but I identified the organism about 1962 approximately.

Q And have you worked with the Pleistoplora ovariae organism extensively since that time?

A Yes. I have directed a graduate study research and published a number of papers on it.

Q And from your experience what is the major impact of Pleistoplora ovariae in the golden shiner?

A In the golden shiner industry the major impact is to necessitate the use of more brood stock than would be necessary without the parasite.

Q And is that strictly a hatchery problem?

A It's strictly a hatchery problem. I have identified the parasite in a farm pond in a stream in Oklahoma, but I have not identified or been asked to identify the parasite in natural populations, in wildlife populations, of golden shiners. I believe a study of museum specimens

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with a date of the collections would be authenticated by the museum

records would be a good place to start. There is no money to do that kind of work.

Q How is the organism of Pleistoplora transmitted?

A Its transmission of microsporidans in general has been very difficult to accomplish as it has been with myxosporidans. In this particular case I have specifically tried experimental transmission. I have tried transmission by feeding spores to fish. And I have studied what we call imaginative or transcendental transmission. That is from mother to daughter of vis a vis the egg. The parasite does not occur in males. It only occurs in females, so therefore it could be transferred from the egg directly to the gonad of the daughter

to the female offspring, and both methods are possible.

Q It would not be contagious to a wild population of golden shiners should Pleistoplora carrying golden shiners be released in the wild?

A I think that that's a possibility. One can't rule it out, but the fact that is that problems have not come to my attention relative to the transmission from introduced minnows to wild populations. In fact, I was asked by the Arizona Fish and Game Department if I could provide them with infected golden shiners for stocking in high

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mountain areas as a biological control of golden shiners. And I told them that I thought it was a

waste of time; that they wouldn't be able to produce a biological control of golden shiners which they are thought to be of some potential problem in competition in selected mountain lakes.

Q Let me back off just a little bit and change the focus here. While you have been working with the golden shiners and the Pleistoplora problem have you had significant contact with farmers raising golden shiners and bait fish?

A Yes, I have.

Q How long a period of time have you maintained that contact?

A I have had personal contact, involvement, with the bait minnow industry since at least 1959. And we did a mationwide survey of the

occurrence of Pleistoplora in golden shiner hatcheries. Two papers were published in 1979; one included about half the number that we finally ended up with in the second populations, but we surveyed 49 hatcheries in the 12 states. These hatcheries produced 65 percent of all the golden shiners sold in the United States. There are approximately 300 golden shiner producers in the United States and we surveyed not the number of hatcheries but in terms of

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the total area, about 65 percent of all the hatcheries.

Q Do you have any idea on the economic terms the magnitude of the bait farming industry?

A The bait-minnow industry in the United States is second only to the

tropical fish business in terms of total dollars and not countage. In short, total dollars it exceeds the catfish industry at least in the survey that was done in about 1980. And the last couple of years the catfish industry is still expanding. I understand the bait fish-minnow is not expanding as rapidly. But in 1980 the bait-minnow industry was second in the United States only to the tropical bait industry and to the catfish and then Salmonid in terms of hatchery-produced fish.

Q Do you have any idea what the dollar figure on that is?

A Well, I should know because I published a paper on it two years ago, but I'm sorry I can't recall the dollars. I didn't review that.

Q That was an unprepared question. Going to the tropical fish industry -- I guess this is not really a tropical fish -- but are goldfish raised in the Unised States as well?

A Oh, yes.

Q And are they raised for aquariums and pet stores?

A Right. They are raised for both bait and aquariums in

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pet stores.

Q And do you know where these goldfish are raised?

A Well, in hatcheries located in Stanton, Missouri is the largest goldfish producer in the United States. And they ship all over the United States and possibly outside the country.

Q And do they also raise bait fish?

A They also raise golden shiners and they may raise flathead minnows. I don't recall that as well.

Q But do goldfish have the same organism problems that golden shiners have?

A Some are shared and some are unique and different. Goldfish do not have Pleistoplora ovariae. Exerimentally we tried to transmit it to them by several different methods and were unsuccessful. So there are refractors to several mechanisms that the golden shiner has, but they do share some in common.

Q Do they have Capillaria catastomi?

A They do not to my knowledge.

Q Golden shiners, as I understand it, are known to have Capillaria catastomi?

A Yes.

Q Is that problem unique to golden shiners?

A No. Capillaria catastomi -- of course the species name is from Catastomus commersoni and it was found in

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the white sucker originally and it's also been found in other species of fish. These parasites, because of a lack of research, found we do not really understsnd very much about the geographical distribution.

Q This Capillaria considered to be a problem as you understand it?

A Capillaria is not a problem on the basis of the information I have acquired in the last three days talking to professional health

specialists and to commercial producers.

Q Is it, in fact, even a true pathogen?

A Some people say it is and some people do not believe it is. They believe it becomes serious in cases where the fish are suffering from malnutrition. And Doctor Andrew Mitchell was a fish health scientist at Stuttgart experimentation told me he questions whether or not it is a true pathogen and it is more of a commensal, and that means it's an organism that lives in association with other species but does not neither harm or hurt.

Q And is there some treatment for Capillaria assuming that someone wants to treat it.

A I do not know of a systematic study to evaluate this. But I do know that what Andrew Mitchell told me over the phone yesterday, the day before yesterday, is that

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Masoten is quite effective in controlling Capillaria but he believes if he had --

MR. HOWARD: Your Honor, with all respect, the witness is not testifying on the basis of his own knowledge and own opinion. He is just relaying someone elses opinion and he's not --

THE WITNESS: Your Honor, may I --

THE COURT: Just a moment.

MR. EGGERT: Yes, Your Honor. This is the kind of information

that I think is routinely relied upon by expert witnesses. And it was relied upon very heavily by the States own witness Peter Walker who testified quite extensively all morning about having heard these problems existing from his colleagues here. And there is no objection made then because either of them were aware that expert witnesses do rely on this type of information on determining their own opinions. And it's quite permissible to testify in a court of law from that information.

THE COURT: Counsel, why don't you lay a better foundation and then I will reserve ruling in terms of how this could be used.

BY MR. EGGERT:

Q During the past few weeks you've had occasion to speak with me over the phone, have you not?

A Yes, sir.

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Q And I have related to you certain information gathered from the state of Maine and whatever regarding the problems that the state of Maine was concerned about in the golden shiner industry; is that not true?

A Yes.

Q And I requested that you do some basic research into some of these areas knowing that you didn't have to do much research in Pleistoplora ovariae but that you would have to refresh your memory on Capillaria catastomi and the Asian tapeworm in order to testify here; is that not true?

A Yes, sir, but also to obtain current information in going to the

literature. By the time a paper is published it's usually two years after the information was acquired and statements made in the heat of describing and finding a new parasite or the currents of a parasite perhaps are different than ones reflection on what has happened two years after that has been written.

Q And in regards to Capillaria I take it you either reviewed the literature or went to a textbook to some extent maybe, didn't you? I don't know. Did you?

A Yes, I did.

Q And then rather than rely strictly on that you referred directly to various other people involved with

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Capillaria?

A People, diagnosticians and specialists and producers.

Q And the purpose of doing that -- or was the purpose of that to find out whether or not the Capillaria was causing any problems?

A That's exactly the kind of question I asked those people.

Q And based upon what they told you is Capillaria considered to be a problem?

MR. HOWARD: We'd renew the objection. There are two grounds to the objection. First of all, to the extent he is testifying from his search of the literature or his own personal research, that's fine. To the extent that he's testifying on the basis of what some other expert scientist told him, we would suggest that's hearsay. And to the extent that he is testifying furthermore on the basis of

what the producers in big farms told him who are not scientists as far as we know at all -- they merely are someone with a very strong interest in encouraging him to say there is a problem -- we strongly object. So, if he is going to say something about Capillaria we have to object very strongly as to what his basis for saying that is. These last two sorts of things I think should be excluded.

THE COURT: Mr. Eggert?

MR. EGGERT: Well, your Honor, I think we

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ought to be a little bit consistent about this. And if we are going to exclude the testimony based upon unnamed sources, I think the State, perhaps, is in a lot deeper trouble than I am in this. Mr. Walker continuously relied upon some

unnamed colleague who we have no idea who it is throughout his testimony. And that's been actually the basis for the State's case. Mr. Walker has no personal knowledge of the Capillaria catastomi, the Pleistoplora ovariae or the Asian tapeworm.

THE COURT: Counsel, Rule 703 is really one of the things reasonably relied upon in the type of expert in forming opinions or inferences that is not noted to be admissible in evidence. Now, I think the issue, counsel, is, therefore, whether in fact that foundation is laid that this, in fact, is information of a type reasonably relied upon by experts in the academic field. Mr. Howard, would you want to speak to that?

MR. HOWARD: Yes. I would say that certainly information from producers of bait fish would not be the

kind of thing that would be relied upon by experts in the field. Those are businesssmen who have an interest in propagating bait fish all over the country. And that's what this dispute is about in many ways; it's the interest of the business as against the states and the government in protecting their fish. So I should certainly

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think that the opinion of businessmen is not the sort of thing that a scientist should rely upon. And he indicated that part of the people that he talked to were businessmen.

THE COURT: Mr. Eggert?

MR. EGGERT: May I pursue this further with the witness, your Honor?

THE COURT: Pursuing the question on the basis of his questions?

MR. EGGERT: Yes.

THE COURT: Yes, you may pursue that.

BY MR. EGGERT:

Q The organism Capillaria catastomi is not a new organism to you, is it?

A No.

Q It's something you have been familiar with in the past?

A That's right. Well, the recent past. There are many parasites of fish. We are not familar with all of them. The list is very large. We are familar with those that cause problems and or recently have been accused or incriminated in causing the problem.

Q And when you are doing research in these various organisms do you not contact a variety of other people to

find out what their experience is with these organisms are?

A I look for trustworthy sources of information; a

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particular commercial source can be distinguished from the other sources. And I can give and provide names and addresses.

This particular producer is a former student of mine. And when I want to know what is going on in the industry then I contact him, because I know I can get a straight answer.

THE COURT: I will permit the question to be asked and answered and counsel may explore on cross-examination.

BY MR. EGGERT:

Q If there is any problem with Capillaria in the golden shiner industry what is it?

A It has caused a problem in a few sources from a few hatcheries. We used to use the term hatchery for a particular location. In those cases it had been associated with malnutrition. And in those cases it was corrected when the fish were properly fed. Fish contain mnay types of worm parasites. They are found all over, and what we are concerned about are parasites which are easily propagated cause serious problems for which there is no known control.

Q So, in properly cared for fish the Capillaria does not cause any known problem?

A That's my understanding.

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Q We have also heard some substantial testimony about what's been

colloquially referred to as the Asian tapeworm. Are you familar with the European experience with the Asian tapeworm?

A The paper has been published which indicated high mortality in hatchery-produced carp as a result of recent introduction of Asian tapeworm in those hatcheries. Research of the literature, European literature, using three major sources did not indicate any other reports dealing with his appearance in Salmonids or any other species.. And going back to that one particular source subsequent years indicated that once the parasite was in that particualr population and it essentially became endemic in the population that there was very little mortality in the fish following that initial exposure.

Q This is the European experience. Is that similar to the experience that has been found in the United States to be?

A Yes, it is. It follows the same pattern.

Q Is it the problem that exists in wild species in the United States?

A It has occurred in most fish in North Carolina. The only wild source that I have heard of it being transmitted I heard this morning a report by the witness

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who indicated it occured in largemouth bass in Kansas. I have not seen that.. That was a report by the person-communications; the same kind of report that I have used.

Q Is that Asian tapeworm found in all golden shiner hatcheries?

A No, it is not. Apparently it has only been found in golden shiner hatcheries where they either have grass carp association with golden shiners or grass carp have been used for weed control purposes. They have not occurred in hatcheries where grass carp have not been found.

Q The grass carp is the major carrier of Asian tapeworm, is it not?

A That seems to be the case.

Q And in those hatcheries in which they have stayed clear of the grass carp they haven't had a problem with the Asian tapeworm?

A That's my understanding.

Q In fact, in your own home state they have imported grass carp for, I assume, for weed control?

A They were widely stocked in Iowa for weed control and they are very

effective and they have not caused any problems.

Q Have they been transmitted to any other native species

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as far as you know?

A We do not know that they have transmitted the Asian tapeworm to largemouth bass or bluegill, B-L-U-E-G-I-L-L or channel catfish.

Q In any event, it would be golden shiners without the Asian tapeworm?

A Golden shiners would be available without the Asian tapeworm.

Q In your experience with the bait farm industry in the United States have you ever come in contact with anyone who has raised carp as bait fish?

A No, I have not.

Q Do you know of anybody or heard of anybody that raises carp as bait fish?

A I do not know.

Q I believe you mentioned the Ozark Fisheries in Missouri?

A That's right.

Q Do you know where they distribute their bait fish product?

A I do not know specifically except that it's my understanding they are very widely distributed including goldfish which are all over, a very wide distribution on goldfish in particular from that source. And they are raised in ponds side by side to golden shiners.

Q In the sampling techniques that we have spoken about - -

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what is called the blue book - - could you explain what that is for us?

A The purpose of it is to provide guidelines for fish pathologists and others concerned about certain spore disease organisms to provide them with guidelines as to proper techniques for sampling fish sources and sample sizes and the kinds of procedures that have been found to be effective for diagnosis, specific diagnosis.

Q And this is, as I understand it, a statistical analysis?

A The sampling procedure is a statistical analysis based on probability theory.

Q With the statistical analysis you would be required for a given fish population to collect at random a certain number of fish to be tested?

A Yes.

Q And then you would use commonly accepted testing techniques to find out if the fish have the disease organism that you would be looking for?

Q Yes.

Q And this blue book allows you to know, does it not that what you are testing is within a certain degree of certainty or statistical probability?

A Ninety-five percent.

Q And that's what is used for testing of Salmonids?

A That's correct.

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Q And as far as you now that was what the United States Fish and Wildlife Department would use certifying fish or eggs for the state of Maine?

A I presume they would use those guidelines.

Q Is there any reason that you can think of that those same sampling techniques or these statistical analysis involved can't be used for bait fish?

A They were designed for those particualr diseases, but on the other hand it's based upon probability theory that is applicable to sampling any parasitic organism.

Q From your experience which types or which species of fish would be more likely to cause a problem for the native Salmonid population in the state of Maine?

A Other Salmonids.

Q And I take it from that it would be less likely that golden shiners would be less likely to cause the problems?

A Right. The most serious disease pathogens of Salmonids are present in other Salmonids.

Q So, does it make any sense in your experience to totally ban Cyprinids and allow the importation of Salmonids if you're going to protect your Salmonid industry?

A I would be most concerned about disease organisms carried by the same species.

Q Based upon your professional experience would bait fish

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farmers - - have you found that in general that they are professional people?

A In any industry there is a range in degree of professional attitude and bearing how they operate the

facilities. The larger percentage of the bait minnow industry is done by people who are very professional and attend to all aspects of their business.

A And do they utilize techniques which would allow them to raise only golden shiners?

A Most of the people in golden shiner industries use what is called the egg transfer method. A pond is drained. It's left dry. Sometimes it's freshly graded. It may be lime treated. And then it's refilled. And they do not put any fish into that pond. They transfer eggs into that pond from spawn fish mothers, fathers taken out of spawning ponds and no other fish are allowed to enter into that pond. And when they

take fish out of that pond the only fish they take out of that pond is golden shiners.

Q And that is similar to using Salmonids eggs?

A In my opinion it's very analogous. In fact it's almost ironic. When they take the mother out of the spawning pond they threw the mother in the back of the truck and without putting them in water they drive down the road until they get to the pond where they are going to put

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the egg mother in. And they put the egg mother in. It would be impossible or extremely difficult for any fish to come with the egg mother. The fish would have to cling to the mother in order to ride along in the back of the pickup.

Q In your professional opinion is there any reason raised here by the state of Maine that would necessitate the total prohibition against the importation of bait fish?

A No.

MR. EGGERT: Nothing further.

THE COURT: Cross-examination?

MR. TERRISON: Yes, sir.

BY MR. TERRISON:

Q. Doctor Summerfelt, I am Mark Terrison Assistant United States Attorney. I have an opportunity now to ask you questions on cross-examination about your direct testimony.

It's clear from your direct testimony that you have some

expertise in understanding of the bait fish industry.

A I hope so.

Q Can you explain in a little bit more detail how it is that you have become associated and understand the production of bait fish?

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A Well, it's the fact that - -

Q Commercial use.

A - - I worked with Doctor William M. Lewis for both my MS and PhD degrees, and Doctor William M. Lewis happened to be specializing in that area. I didn't seek him out because he had that specialty; it was merely a coincidence.

Q This was at Southern Illinois University?

A Southern Illinois University. And therefore I had the good fortune to work under Professor Richard Coudeau who is a prominent protozoologist.

Q And it's through these two people that you were initially introduced?

A Yes.

Q I understand that through these two individuals that you were first introduced to the bait fish industry and bait fish producers or became interested in their commercial enterprises?

A Through Doctor Lewis. Doctor Coudeau introduced me to the study of protozoology. And I took a year's course from Doctor Coudeau.

Q Through these two people?

A Doctor Lewis. I tried to correct that. Doctor Coudeau introduced me to the study of protozoology.

Q That's from Doctor Lewis that you became involved initially?

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A That's correct.

Q And then you testified that you have students who are now involved?

A Not now.

Q And you also testified that you had occasion to produce some scholarly problem on the bait fish industry on the economics of that industry; is that right?

A Yes, sir.

Q And how is it that you became involved in the preparations of that particular study of the bait fish industry?

A Well, it was purely by, I suppose, by chance that I originally discovered the ovary parasite in the golden

shiner. But I was taking a course in protozoology from Doctor Coudeau at the same time that I was doing diagnostic work in Doctor Lewis' laboratory. And when I was examining these fish I found the parasite. And I noticed the color and unusual appearance of the ovary. I did wet mounts and histological sections and found these organisms. And I right away recognized that they were these particular group of parasites and I did not - - I was not aware of any previous description of the parasite of that nature.

So I conferred with Doctor Coudeau and he informed me that there were none. And so I began an

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investigation and subsequently my continued working in that area was

because it was an important - - what I thought was an important - - problem in the bait-minnow industry at that time. So I continued to work on it, on the parasite and also just the intriguing fact that no one understood much about this organism; that I wanted to continue working on it and explore its life cycle.

Q And hopefully to use some of this information gained academically in the research realm for a practical application for the bait fish industry?

A Right.

Q And as a result of some of this work you also became involved in the study of the economics of the bait fish industry?

A Yes, sir.

Q And in studing the economics of the bait fish industry you were seeking, I assume, to find out what kind of connection there might be between any of these diseases and the economic problem that might result to the bait fish producers if these diseases were left unchecked or at least had - -

A Yes, generally.

Q And as a matter of fact, even when you started with your doctoral dissertation I understand that was in something

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like looking for a serum that would be able to be injected into specifically the golden shiner in order to make it a little more resistant to certain types of diseases?

A That's correct.

Q So, you've had this interest for a long time?

A Yes, sir.

A And during the course of this interest you have developed associations with people in the bait fish industry?

A Not personal associations, no, except for the manager of Ozark Fisheries is my former student.

Q Who is that?

A Stan Smith. He is production manager of Ozark Fisheries at Stanton, Missouri.

Q Did you consult with other producers in preparation for testimony today?

A No, I did not. I consulted with extension specialists Adam Welburn at - -

Q Is he a producer?

A No.

Q Limit it to producers, please.

A No other producers.

Q Now, in connection with your testimony regarding Pleistoplora do I understand that you concluded that there were a number of specific diseases that were listed

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on a list of possible contagious diseases that for which there was no known cure, but the Pleistoplora was not among them?

A That's right.

Q And you further concluded that it was very debatable that which kind of diseases or parasites or what have you should be included on that list for which there was no known cure available?

A That's right.

Q So that there is really no general consensus, at least among the profession, as far as what can be included on some list like that? In other words, you are going to find some who think some should be included and other biologists or fish pathologists will conclude otherwise?

A That's correct.

Q Now, in connection with your Pleistoplora ovariae research I understand you to testify that you had first become aware of it in 1962?

A Yes.

Q Were you aware that that had not been discovered in Maine at all or had been seen in the wilds of Maine at all until you were here in Portland today?

A That I did not know that it had been seen in the wilds in Maine, that's right.

A And essentially you have conducted most of your studies

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in the Iowa area and you haven't conducted anything here in Maine?

A Our survey was national. We sampled 49 sources in 12 states.

Q Was Maine among them?

A It did not have the commercial producer at that time at which that survey was done and or it was not a large commercial producer. We wanted to cover a major portion of the industry.

Q. But the conclusion is you haven't studied anything in Maine?

A That's right.

Q You haven't studied any fish hatcheries in Maine and any ponds on which you have based any of this testimony on?

A That's right.

Q And you haven't studied anything about fish populations in the wild in Maine?

A That's right.

Q So, any conclusions here that you are presenting today would be based on studies at least outside of our state?

A Right.

Q Furthermore, I understand that not only have you not studied fish in Maine in the wild but that generally you have not studied fish in the wild anywhere, is that correct?

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A No, that's not correct.

Q Well, isn't most of your experience in the raising of hatchery fish under controlled conditions?

A No. I have published papers on parasites and reservoir fish populations and in far ponds.

Q But these are not in the wild, is that right?

A Those are wild.

Q You consider farm ponds in the wild?

A I certainly do. They are not in a natural lake. Some of them maybe natural, but most of them were man-made lakes. But they are still wild populations, right.

Q Is it also fair to say in a general way based on what you've testified about is that your expertise is more in the area of some of the warm water fishes and not the cold water or Salmonids types?

A That's right.

Q So that if you had said anything in the course of your testimony about say landlocked salmon or any kind of Salmonid type fish here in Maine it would be based not on your own research or your own studies?

A That's correct.

Q Now, I understood you to testify in addition about the contagiousness or the transmission of certain of these parasites or bacteria or organisms, and your conclusion was that it was difficult to transmit from -- I think

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you said - - mother to daughter.

A Right.

Q At least as far as the Pleistoplora is concerned?

A That's in the parasite.

Q Was that based on the study under controlled conditions; in other words, not in the wild?

A It's based upon a combination of sample data from commercial hatcheries as well as laboratory experience.

Q But not in the wild?

A By the wild I understand your meaning of it. As I understand the meaning of it, that's true. It was not done in the wild populations.

Q So, it was commercial hatcheries and then in research labs?

A That's right.

Q So, your conclusion viewed in a narrow sense, or at least as far as you'd be willing to take it, would be directed only to commercial enterprises or in the laboratory?

A I think one can make inferences on the basis of literature and information as well as personal experience with hatcheries and laboratory experience. But in the strict sense, you are right.

Q So that you wouldn't be willing to say that these were not necessarily transferable to the wild at least?

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A We can't answer that definitively.

Q You are not ruling it out?

A That's right.

Q Now, in connection with the transfer of these diseases and the contagiousness of them, do I understand correctly also that your study was limited to the warm water or golden shiner fish?

A The studies on Pleistoplora have included golden shiners and goldfish.

Q And how many appreciability do they have to the Salmonid type?

A Would you rephrase that? I'm not sure I understand what you want.

Q I'm trying to get at the most basic of your conclusions in these particular studies concerning the contagiousness of certain diseases. If we look at the population of the diseases that you studied it's the warm water, golden shiners and you have also mentioned goldfish.

A I also described a species occurring in lakes in the state of Michigan in the stream of fish and different species; three species of Pleistoplora. So I have experience with Pleistoplora species and I have also seen samples and did analyze Pleistoplora occurring in rainbow

trout in the West. It occurs in the gills of rainbow trout. That's the fourth species which I did

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not describe. There are only five species in Pleistoplora in the North American fisheries, and I have described three of them.

Q But what I'm getting at is the one that you have described and the ones that you've expertise in and the ones that you've dealt with yourself are not necessarily conclusive as to say landlocked salmon or some of the Salmonid fishes in Maine?

A That's right.

Q Do I understand that you have testified during the course of your direct examination also about Capillaria catastomi?

A Yes.

Q And I believe your basic conclusion was something that Capillaria catastomi is not a problem?

A Yes, sir.

Q Do I understand correctly that one of the effects of Capillaria catastomi is to stunt the growth of the fish of the host fish?

A I don't believe that's true.

Q So, you would be in disagreement with any evidence to that effect?

A Because Capillaria catastomi occurring in fish that are suffering from malnutrition and, therefore, the problem of stunted growth is probably more related to stunted

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growth than the Capillaria catastomi. And I don't think anyone can prove otherwise.

Q In any event, even your conclusion in that area is limited to commercial hatcheries or research labs?

A It's limited to published data.

Q And published data.

A I need to correct that statement because it wasn't - - I didn't finish. It's limited to published data and the information I acquired from fish health specialists.

Q And this published data and the information you acquired from the fish health specialists was limited from what I understand the hatchery populations, commercial hatchery populations, or research populations?

A That's right.

Q And it had no basis at least in the study of populations that were in the wild?

A However, related rematode worms that I have studied in the wild with both catfish and carp have not caused any problem.

Q I'm interested in what the published data and consultations with the health specialists upon which you relied for your testimony that was based - - all that information was based - - on hatchery populations and not populations in the wild?

A That's right.

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Q So that even though Capillaria catastomi doesn't cause a problem according to your testimony for carefully cared for fish, if fish were in the wild and were competing with say other species that were new it's possible, is it not, that

Capillaria catastomi may cause problems in the wild even though you haven't studied it?

A I'd like to comment in answering to that question that part of your statement is that carefully cared for fishes. Fish disease specialists almost unanmimously feel that fish that are reared in ponds or raceways where they were reared very intensively, even though carefully cared for, might be appropriate. Those fish are more susceptible to disease episodics in the wild because of the close proximation in which they are reared.

So, generally the wild population would be less susceptible to the disease than a population reared in the hatchery.

Q But in totality of the information available it's primarily hatchery research we have?

A Right.

Q Now, in connection with the Asian tapeworm I understand that that tapeworm has at least on one occasion, to your knowledge and maybe on another occasion, according to the testimony of other witnesses today, occurred in the wild; is that correct?

[138]

A Yes.

Q I want to go on to the testimony which you gave us concerning the grass carp. And I understand that you have studied and are familiar with grass carp in Iowa; is that right?

A Well, I haven't studied grass carp in any formal way, no. I have read

about it and have attended some symposium workshops on grass carp. It's a very controversial fish.

Q And what you have as far as conclusions that you have presented today are based upon experiences, research, what have you, that has occurred in Ohio and the mid West areas, is that correct?

A That's right, throughout the mid West and south central United States.

Q Nothing involving the Northeast?

A That's right.

Q At this point I'd like to move on, if I might, to the sampling techniques about which you testified.

A Right.

Q And you testified that there were certain sampling techniques used for diagnosis. And this was the

statistical analysis and it was placed on principles of probability. And as far as Salmonids was concerned there is a commonly accepted technique for sampling fish

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populations to test for certain diseases.

A Right.

Q That so-called commonly accepted technique, however, has not been commonly accepted in your profession, has it, in regards to warm water fish such as the golden shiner?

A There are two reasons for that.

Q Would you conclude with me, first, that it hasn't been accepted?

A Right.

Q Therefore, even among the experts - - which I'm asuming you and the

individuals here who have testified know so much more about fish than any of us do even among the experts - - there is no accepted sampling testing procedure?

A That is not saying the same thing. When the experts decide that basically there is no need for a specialist of respected warm water parsites, therefore you don't need to design the sampling problem for them. So you are putting the cart before the horse.

Q So there is no list?

A There is no list, because we do not have pathogens in warm water fish or similar magnitude.

Q The point is, there is no accepted test for these kind of warm water fish in your profession? I mean, that is the bottom line, isn't it?

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A Because we do not have a list. You have to have a list for reportable diseases to develop a test for. We cannot test for these organisms; that's saying two different things.

Q Maybe you're misinterpreting my statement and my question. Maybe you don't have the list and the list which is very debatable. Nevertheless, because of that or for whatever reason there just is no accepted sampling procedure for these kind of fish?

A The sampling design is based on probability theory and the same design would be used for warm water fish and cold water fish. The technique for identification of the parasite would be related to the parasite.

Q But your colleagues in the field - -

A I have not - -

Q May I finish, please.

A Yes.

THE COURT: Let the lawyer finish the question and respond.

BY MR. TERRISON:

Q But your colleagues in your field have not seen fit to recognize in your profession a sampling test for these fish, is that true, an accepted sampling procedure?

A I'll answer that yes.

Q Thank you. My colleague has reminded me of one question

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that I should ask. Have you or your employer at the University of Iowa - - Iowa State, is it?

A Yes.

Q - - received any funds or financial support from the bait fish industry?

A None. Wait a minute, sir. Let's go over that question again because there are two components of the question. I was answering that Iowa State has not received any funds from the bait industry. On my time or separate from me since I have been employed by Iowa State I have received support from the bait industry when I was in Oklahoma when I was working intensively around the Capillaria catastomi in golden shiners.

MR. TERRISON: Thank you. Nothing further.

THE COURT: Redirect?

MR. EGGERT: Yes.

REDIRECT EXAMINATION

BY MR. EGGERT:

Q Doctor, on cross you said that there is no sampling procedure for the warm water fish because none is really called for.

A We have never been asked to prepare a list and there are no restrictions on interstate shipment of bait minnows related to their diseases, so therefore there is no need for such a procedure.

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Q And if there were to be developed a reportable list of pathogens you could easily develop such a sampling technique, could you not?

A I certainly could for Pleistoplora ovariae. If you were to extend that to unlimited lists we'd have to ask

the specialists for an answer. I would say the ones we have been talking about you certainly could.

Q But it's not a task that is insurmountable by any means? It would just require that those experts in the field would get together and do it?

A Right. I agree.

Q And there has been no need to do it up to this point?

A Correct.

MR. EGGERT: Nothing further.

THE COURT: Any recross?

MR. TERRISON: Nothing further on recross, your Honor.

THE COURT: The witness may step down.

Thank you doctor.

(Witness excused.)

THE COURT: Mr. Eggert, what are the defendant's plans for the remainder of your testimony?

MR. EGGERT: Mr. Taylor and I will be done. I don't anticipate very long on direct.

THE COURT: What do you mean? Fifteen

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minutes?

MR. EGGERT: Not even five to ten minutes maybe.

THE COURT: Would the court reporter be up to continuing?

THE REPORTER: I'd like a break.

(Recess taken at 2:55 and reconvened at 3:10 P.M.)

THE COURT: Mr. Eggert?

MR. EGGERT: Robert Taylor, please.

WHEREUPON

ROBERT J. TAYLOR, was called as a witness on behalf of the defendant, and having been duly sworn by the Deputy Clerk, was examined and testified.

BY THE CLERK:

Q Would you have a seat, please. State your name and spell your last name for the record?

A Robert Taylor, T-A-Y-L-O-R. And I have a residence Argyle, A-R-G-Y-L-E, Maine.

DIRECT EXAMINATION

BY MR. EGGERT:

Q You are a businessman in the state of Maine, are you not, Mr. Taylor?

A Yes, sir.

Q What business are you in?

A Fish farming.

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Q And do you have any other sidelines to that business?

A I wholesale and distribute live fish, worms, night crawlers and minnows.

Q And how long approximately have you been in the business?

A Nineteen years.

Q And you have made your living from this during that period of time essentially?

A Since 1969.

Q Would you describe in general for us what you do with your fish farming part of your operation?

A We manage about approximately 70 acres of golden shiners in Orono, Maine. We have three large ponds of approximately two 20-acre ponds and one 16-acre pond.

Our methods are both expensive and intensive culture. We have used a fly fish to grow our pond and some

fish we raise with adult fish in the same pond.

Q And how did you learn to do or to perform this operation or to raise bait fish?

A I tried to catch the fish wild or from local supplies for a good many years. And the unpredictability of wild supplies and weather factors and mother nature in general made it inpractical to suppliers of these resources. So for a dependable supply I started to fish farm to supplement the wild fish.

Q And during this period of time when you were becoming

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established and learning this business did you travel to Arkansas to witness other fish farming operations?

A Yes.

Q Where did you go in Arkansas?

A I traveled extensively; to Little Rock where I visited farms in Des Arc; the general bait fish people which is the Anderson Minnow Farms, Saul Minnow Farms, Roy Prouwitz's Farm, King Farm, Jim Mylon's Shiners Fish Farm; I visited the diagnostic station in Stuttgart, Arkansas and I think the Joe Hogan Fish Farm.

Q Did you observe the fish farming operations at these various places when you were there?

A Yes, sir.

Q And what was your impression of these fish farming operations?

A The water supply was not surface water as I'd been led to believe. The fish farmers are pushing from

large wells that they drill. They can drill fairly shallow by our standards and use a submersible pump and pump this water out of the ground to fill their ponds. Sometimes they use the water from one well to service one to three ponds, but frequently it is one well-one pond type operation.

Q Why do they use the well? Do they drain the ponds?

A The ponds are tapered for trying for control of disease

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parasites and management procedures. They also fertilize the pond, lime the pond and having clear water with no indigenous species of carp on their crop.

Q In that environment they raise golden shiners?

A Yes, sir.

Q Is that a fairly large industry in the United States?

A Yes, sir.

Q Do you have any idea of the dollar value of the output of bait farming?

A I believe the Arkansas economic department estimated sometime ago the bait fish industry at 160 million dollars a year in 1980. I could be wrong, but that's very close.

Q Are you able to raise with the same consistence and capability golden shiners in the State of Maine as the farmers in Arkansas can do it?

A We do not have - - I do not have the expertise that these farmers with 30 or 40 years of experience. I do not have the resources of the federal government for diagnostic services

that they have. I do not have a water quality not the air temperature to grow the fish as rapidly as they can grow them. We have been successful in raising more fish than any other farm in the northeast. We have had mortalities. We have had our problems to where disease parasites, lack of oxygen,

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mistakes that have caused catastrophic losses. We have lost everything after we have operated the farm for a year.

Q What effect does the climate and the seasons have on your operation?

A To economically hold fish in any volume underneath the ice for perhaps four to five months puts a stress on the animal that he doesn't seem to be

able to withstand. I realize that the wild population probably withstands itself, but I believe it was stated that at one pound per acre we just harvested a pound per acre with two hundred and fifty pounds per acre, which is quite an increase in population from the natural one pound per acre.

Q Another aspect of the seasons is when - - when do you have your biggest demand for your bait fish product?

A During the ice fishing season from January 31st to the 31st of March.

Q Is that the time of year when you have the most problem with having product to sell?

A Yes, sir. We are harvesting the fish now and hope to keep them alive until March which will be the end of season.

Q And if you can't do that how can you supply your customers?

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A I can't.

Q And if you can't legally import bait fish that's detrimental to your business, is it not?

A Yes, sir.

MR. EGGERT: Nothing further.

THE COURT: Cross-examination, Mr. Terrison?

MR. TERRISON: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. TERRISON:

Q I am Mark Terrison Assistant United States Attorney and I have an opportunity to ask you questions on cross-examination.

Do I understand correctly that you are a retired military person?

A Yes, sir.

Q On pension from the military?

A Yes, sir.

Q And do I understand correctly that you have had no formal training in fish culturing?

A I attended a workshop on fish health management at the University of Maine in 1978.

Q And how long was that workshop?

A A one-week workshop.

Q And is that the extent of it?

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A Formal education.

Q For fish culture?

A Yes, '78.

Q I believe you testified you have been doing this for some nineteen years on and off and since '69 on a full-time basis?

A Yes, sir.

Q Then it's obvious that you went into business doing this sort of thing at the time when the Maine statute was in effect against the prohibition of live bait fish?

A Yes, sir.

Q And as a matter of fact, you've known that that statute has been in existence, haven't you, the Prohibition Act statute?

A Yes.

Q And you even went to the legislature in early 1981 to see if maybe there was some sentiment there to repeal that particular statute?

A I think it was 1980.

Q In 1980.

MR. TERRISON: I have no further questions.

THE COURT: Thank you. Any redirect, Mr. Eggert?

MR. EGGERT: No redirect, your Honor.

THE COURT: Thank you. The witness may step

[15C]

down.

(Witness excused.)

MR. EGGERT: We rest.

THE COURT: Thank you. Mr. Howard, does the government have any rebuttal?

MR. HOWARD: We have only one thing. At the conclusion of Mr. Walker's cross-examination earlier today a quotation from a newspaper article was read to him. It's a quotation from a statement of the position of the Department of Inland Fisheries and Wildlife. And we have the

entire statement which we would like to put into the record. He can put Mr. Walker on the stand and have him unless there is an objection.

THE COURT: Can you stipulate it in?

MR. TERRISON: It's the whole statement.

MR. EGGERT: I have no objection.

THE COURT: Can we stipulate in then as being a statement without putting Mr. Walker on the stand?

MR. EGGERT: Yes.

THE COURT: Very well. The record should reflect that counsel have stipulated the admission of Government Exhibit One entitled Bait Fish Importation, the position of the Maine Department of Inland Fisheries and Wildlife. And is it the

further stipulation that this is a statement prepared by Peter Walker?

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MR. HOWARD: It was prepared by Mr. Walker and his superiors Mr. Locke of the Department.

THE COURT: And his superiors of the Maine Department of Inland Fisheries and Wildlife stipulate to that?

MR. LEVANDOSKI: Yes, I stipulate to that.

THE COURT: Based on two stipulations the exhibit is admitted. Anything else?

MR. HOWARD: No. And with that the government and the state rests finally. With regard to what further proceedings should happen here, we would be prepared to argue now. But it seems to me that after having had this hearing today

that everybody might be better off with briefs being prepared on both the law and the relevant facts as we heard them today. So I would suggest that to the Court and see.

THE COURT: Let me hear from the defense on that as well. Before your answer, as counsel know, as I indicated to you before, since the role of the magistrate in this case is to issue a recommendation on the Motion to Dismiss based upon the evidence with discretion we'll review a transcript which will be necessary in any event, and that review cannot take place without the transcript. And so it may be that counsel wish to review that transcript and address any issues.

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MR. HOWARD: Moreover, regardless of which way counsel recommends the other

side will wish to reverse your recommendation to the District Court and write a brief on that point. So I thought that perhaps, your Honor, might have the benefit of our considered views in advance.

THE COURT: Mr. Eggert?

MR. EGGERT: Framed in that fashion, your Honor, I guess I may as well fight the rule and write the brief right away wheneer the transcript is prepared. So I would join in with the State's request on that, and I would recommend we'd have a reasonable amount of time after we get a copy of the transcript.

THE COURT: Let's see. Twenty-one days from the receipt of the transcript will be acceptable for briefing?

MR. EGGERT: That's fine.

THE COURT: Would you file them simultaneously or in sequence?

MR. HOWARD: I prefer briefs seriatim because they don't - -

THE COURT: The motion is of that of the defendants and certainly I think that would be a reasonable position. Of course the defendants could brief - -

MR. EGGERT: It is the State's burden, however.

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THE COURT: That's true. On the other hand you've briefed it.

MR. EGGERT: We have briefed the issue without the benefit of the extensive development of the facts up to this point.

THE COURT: I will schedule 21 days and 10 days with any responding brief if you find after reviewing your opponent's brief without filing any response. Let me indicate one or two things that I would like to see addressed. One of them I think

that was very briefly adverted to in one of our efforts on the initial briefs that I would like counsel to address the question of the significance of the fact we have a congressional statute here somehow incorporating the state law. In other words, there is a prosecution under federal law. I would like you to address the implications that has for the interstate commerce challenge. This is not simply a challenge to a state statute, but state statute applied by federal statute.

And the second issue - - and this is something that I have not pursued at great lengths and you may be able to address it within a paragraph and no more than that but just perhaps a paragraph - - address the question of standing to raise the objection here, the objection to the statute which I take it is based upon

discrimination againt interstate commerce, but is being raised by, as I understand

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it, an in-state producer. Counsel may decide that that can be addressed very similarly, but the Court would appreciate any reasoning that could be afforded.

Do you both understand what my question is that you can address that?

MR. HOWARD: The defendant here, of course, wishes to engage in interstate commerce.

THE COURT: And you don't need to argue that now. That may be enough. But I would just give it a paragraph on that so that the Court can find it resolved.

Very well then. Counsel should arrange with the court reporter following adjournment with respect to the preparation of the transcript, but we will set a period

of 21 days for the filing of the original briefs and 10 days thereafter for the filing of any response. And there will not be any further need for further oral argument?

MR. EGGERT: No, your honor.

MR. HOWARD: Not unless the Court wants it.

THE COURT: The Court will take it then under advisement.

Is there anything else that should come before the Court? Mr. Howard? Mr. Terrison?

MR. TERRISON: No, your Honor.

MR. HOWARD: No, your Honor.

THE COURT: Mr. Eggert?

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MR. EGGERT: No, your Honor, not at this time.

THE COURT: Very well, the Court then stands adjourned. Thank you very much.

Whereupon Court adjourned at 3:50 P.M.)

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CERTIFICATE

I hereby certify that the foregoing transcript is a true and accurate representation of my stenographic notes taken in the aforementioned cause of action.

s/ Virginia M. Royall
VIRGINIA M. ROYALL
Court Reporter

GOVERNMENT EXHIBIT NO. 1

BAITFISH IMPORTATION:
THE POSITION OF THE
MAINE DEPARTMENT OF
INLAND FISHERIES AND WILDLIFE

Recently, Mr. Robert Taylor, a licensed bait dealer from Argyle, Maine, has expressed his intent to fight for a repeal of Maine's ban on the importation of baitfish. It is the intent of this department to oppose any such attempt. Our reasons are various and well-founded.

One of our prime concerns is the prevention of the introduction of exotic species of fish into Maine waters. By the term "exotic"," we mean any species of fish that is not indigenous to the State of Maine.

Whenever a new species is introduced to a body of water, it invariably has some impact on the other fish species present

and the ecosystem as a whole. All too often, experience tells us, this impact is negative. In other words, those fish populations already present are adversely affected in some way. Even in the case of deliberate introduction, it is seldom known beforehand what the exact effect will be. Unfortunately, in most instances, the full impact is understood only after the fact.

A case in point is the common carp of Europe and Asia. In the late 1800s, the carp was heralded as "the fish of the future" -- an answer to agricultural woes in the Midwest. The Federal Government arranged for shipments of carp from Europe and the fish were disseminated throughout the country by means of a special railroad car. From an economic standpoint, the carp was a dismal failure. The hoped-for lucrative markets never materialized.

If carp were an economic failure, they were a biological disaster. They escaped into the wild nearly everywhere they were raised causing incalculable harm to the environment. They competed directly with many less aggressive fish species and their habit of alternately sucking up and spitting out bottom sediment clouded the water. Cloudy water prohibits sunlight penetration and this, in turn, reduces plant and algae growth. Thus practically all aquatic organisms from the tiniest microbes to waterfowl were adversely affected. Sadly, it is damage that will probably never be undone.

The carp is only one of many such cases. In a recent article in the "New Hampshire Times," Dr. James McCann, a biologist with the U. S. Fish & Wildlife Service in Gainesville, Florida states:

"Nationally, we have identified 84 different species of fish that have been brought into the United States recently. Of this number, 41 have established breeding populations and are basically out of control. . . . None of us knows what the total impact of this will be, but the spread of exotic fish is something that could damage fish life as we know it now. This whole thing has been seriously underestimated by government, and I hope somebody starts to take notice in each state."

Of course, at the State of Maine level, fish species native to other states may be just as "exotic" and just as dangerous as those foreign to the United States as a whole. In many states that have no importation laws, the significant proportion of the fish population is

comprised of non-indigenous species. Here in Maine, though, we are still relatively unscathed. Tough importation laws over the past twenty years have undoubtedly served to keep out exotics that have spread widely elsewhere.

Even so, two non-endemic minnows have recently become established in Maine -- probably as a result of illegal bait importations. Neither the spottail shiner nor the emerald shiner were originally found in Maine. However, a tremendous wild baitfish industry has sprung up on the Canadian side of the Great Lakes. We have strong reason to believe that illegal shipments originating from this source have resulted in the establishment of these two species here in Maine.

It is by no means just the principal bait species that we are concerned about.

In one shipment of emerald shiners examined last winter, a department biologist found 15 other fishes of six different species including three never before recorded in Maine. This points out the very real danger that exists here. There are many fish species in the Great Lakes, Arkansas and elsewhere that could cause considerable environmental harm if introduced into Maine. We do not feel that such a risk is justified.

The dangers of bringing in exotic diseases or parasites is another serious concern. One prime example is a species of tapeworm now widespread through the golden shiner industry in the South. It underscores our previous point to explain the whole story:

In the 1980s, a big push developed to introduce the grass carp or white amur from

Asia as a biological weed control. The original plan was to import a few thoroughly-inspected fish and quarantine them at a federal research facility in Arkansas while their habits and effects on the environmental were studied. Unfortunately, certain fish farmers couldn't wait and took matters into their own hands. A second, uninspected shipment was smuggled into the country and soon distributed to fish farms in several states. Contrary to advertising claims, this species can and has reproduced in the wild environment in North America. In other words, like the common carp before it, the white amur is now out of control before we know what the impact will be.

It was in fish of that second, uninspected shipment that the Asian tapeworm (Bothriocephalus acheilognathi)

apparently entered the United States. It soon showed up whereever the grass carp spread. The parasites's life cycle involves tiny planktonic water fleas as intermediate hosts. Since golden shiners feed heavily on water fleas and, since this parasite can apparently infest almost any species of fish, the southern shiner industry was soon plagues with Asian tapeworm problems. Our sources tell us that virtually all of the Arkansas/Missouri area golden shiner stocks are contaminated with this tapeworm.

The grass carp is a very large, fast-growing minnow. Correspondingly, the tapeworm is comparatively large and fast growing. In its natural host the parasite coexists without causing any particular damage or ill effects. In small, slow growing, unnatural hosts such as golden

shiners, the story is quite different. A tapeworm or a whole "knot" of tapeworms quickly grows so large that the host fish's digestive tract is blocked resulting eventually in starvation.

In commercial minnow culture, the Asian tapeworm can be suppressed by feeding special drugs called antihelminthics. In the wild, however, such measures of control are not feasible.

We feel that, until proven otherwise, the Asian tapeworm represents a threat to the fisheries of the State of Maine. In the same "New Hampshire Times" article, Professor Bill Rogers, noted fish parasitologist and head of the prestigious Department of Fisheries and Allied Aquacultures at Auburn University in Alabama said "It is possible for the (Asian) tapeworm to get into fathead

minnows, possible for it to invade any plankton-eating fish." Here in Maine, the establishment of this foreign parasite could mean serious trouble for our native minnow and smelt populations. Smelts, in particular, are extremely important to the forage base for our native landlocked salmon and lake trout fisheries. The health of these fish is of prime importance to the sportsmen of the State of Maine.

Professor Rogers went on further to say: "I know I have seen references to the tapeworm having been discovered in New England. . . . If it were up to me, I would have voted to have the tapeworm restricted. It is widespread now. . .

"No one knows what the final outcome will be. Let me tell you that part of the problem is the attitude of the fish bait industry. One of the people in the

industry told me that now the worm is everywhere, there is no cause for alarm in the industry because there is no need for restrictions!"

There are other bait minnow diseases which we still know very little about. These diseases include a protozoan parasite called Plistophora ovariae, which slowly destroys the ovaries of female golden shiners, a recently discovered golden shiner virus disease and a protozoan causing "snownose disease" (Dicauda atherinoidi) on the heads of emerald shiners. What the effects of these would be to our populations of Maine baitfishes is not known. There are too many examples of what has happened elsewhere to justify taking unnecessary risks.

In the trout and salmon industry, certain states (including Maine) impose

rigid controls with respect to the importation of eggs and fish. Hatcheries must pass strict disease inspections before shipment is allowed. It has been suggested that such a system could be applied to the bait industry. However, we are still many years away from such developments. The salmonid fish disease program is the culmination of decades of research and many millions of dollars invested. Before similar disease inspection techniques can become implemented by the bait industry, it is likely that a program of the same magnitude will be necessary. Scientists have yet to agree on which baitfish diseases are serious enough to warrant restriction to say nothing of developmeng reliable techniques for their detection.

It has also been argued that, from a supply standpoint, there is no other way to

maintain Maine's live bait industry than to import shiners from out of state -- illegally or otherwise. We strongly refute this statement and have much evidence to back us up.

One part of this argument states that minnows can't be raised economically in Maine. There is a great deal of evidence to the contrary. It may or may not be impossible to raise numbers of golden shiners -- the principal species being smuggled from Arkansas -- to a marketable size in a single Maine growing season. However, there are some fourteen other species of bait minnows now breeding in the wild in this state which have not yet been tried on a large scale. We find it very interesting that, second only to Arkansas in the commercial rearing of baitfish, is the State of Minnesota with a climate

equivalent to or perhaps even more severe than ours! The bulk of Minnesota's production consists of fathead minnows, a species established and available to Maine bait farmers in several Maine waters.

There is an ever-increasing amount of minnow culture technology available in the form of scientific and trade literature, books, and pamphlets and, in some instances, directly from the sources. The U. S. Fish & Wildlife Service and certain universities are helping to make more and more information available every year. In the past year, Superintendent of Hatcheries David O. Locke has given two lectures to Maine aquaculturists on the fundamentals of baitfish farming. The lectures were apparently well received since several individuals have now expressed their intent to begin such operations. We heartily

support these ventures and fully expect them to succeed.

Another part of the pro-importation argument is the contention that there simply is nowhere near enough wild bait available in Maine to supply the demand. Perhaps there isn't enough available to consumers at this point in time. However, there is certainly a lot more wild bait in many areas that is not yet being exploited. What appears to be lacking is adequate storage facilities for wild bait at the wholesale level. At present, there are a few, if any wholesale bait dealers with holding facilities large enough to store an adequate stock of wild bait from the time it is gathered in the fall through the winter season. This may soon change, however. We know of at least one wholesaler who is near the completion of

such a facility. Still another has recently contacted us with a similar proposal.

Commercial minnow farming will undoubtedly involve substantial capital outlays for pond construction. An alternative to be considered is the existence of hundreds of rural farm ponds in Maine which are physically incapable of supporting trout but well sited to minnows. Enterprising bait dealers could work out arrangements with landowners whereby minnows would be raised and the profits shared. Intensive culture, wherein the ponds are fertilized and the fish fed regularly, should increase the yields of such ponds substantially.

In lieu of these facts, we can't help asking why we should spend our money in Arkansas when it is far better spent at

home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.

The fish importation issue is complicated and our position is a conservative one. But we have much to protect and urge the support of bait dealers and sportsmen alike in taking this stand.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES, Plaintiff-Appellee,	)	
v.	)	No. 84-1699
ROBERT J. TAYLOR) Defendant-Appellant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States, the plaintiff above-named,

hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on April 10, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

s/ Margaret A. Hill
MARGARET A. HILL
Attorney
U.S. Department of Justice
(202) 633-1442

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES, Plaintiff-Appellee,	)	
v.	)	No. 84-1699
ROBERT J. TAYLOR Defendant-Appellant.	)	

MOTION TO DISMISS APPEAL
TO THE SUPREME COURT OF THE UNITED STATES

On May 10, 1985, the United States filed a notice of appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on April 10, 1985. The United States filed an appeal pursuant to 28 U.S.C. § 1254(2).

The United States has now determined not to appeal the final order dismissing the complaint to the Supreme Court and has

advised the defendant's counsel of its decision not to do so. The United States and the defendant have also agreed that the appeal should be dismissed without the assessment of costs to any party since no costs have been incurred.

WHEREFORE, the United States, by its attorney, Margaret A. Hill, moves the Honorable Court to dismiss the appeal in the above-named case without the assessment of costs to any party.

Respectfully submitted,

s/ Margaret A. Hill
Margaret A. Hill
Attorney
Department of Justice
(202) 633-2721

JULY 15, 1985

UNITED STATES COURT OF APPEAL
FOR THE FIRST CIRCUIT

No. 84-1699

UNITED STATES,
Appellee,

v.

ROBERT J. TAYLOR
Defendant, appellant

ORDER OF COURT

Entered: July 16, 1985

Upon motion of the United States,

It is ordered that the appeal of the United States to the Supreme Court of the United States be dismissed without the assessment of costs to any party.

By the Court,

Francis P. Scigliano

Clerk

[cc: Messsrs. Eggert, Howard, Terison, and Suel]

APPELLANT'S BRIEF

No. 85-62

In the Supreme Court of the United States

October Term, 1985

STATE OF MAINE,

Appellant,

v.

ROBERT J. TAYLOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF APPELLANT

JAMES E. TIERNEY
Attorney General
State of Maine

CABANNE HOWARD
(Counsel of Record)
Deputy Attorney General
State House
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December 19, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

Question Presented

May the State of Maine, consistent with the Commerce Clause and the Lacey Act Amendments of 1981, prohibit the importation of live bait fish in order to protect its ecology from diseased and exotic wildlife?

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Opinions Below

The Opinion of the United States Court of Appeals for the First Circuit is reported at 752 F.2d 757 (1st Cir. 1985), and is reproduced at Appendix A of the Appellant State of Maine's Jurisdictional Statement.

The Memorandum and Order of the United States Court of Appeals for the First Circuit denying the petitions of the United States and the State of Maine for rehearing is reported at 752 F.2d 764 (1st Cir. 1985), and is reproduced at Appendix B of the Appellant State of Maine's Jurisdictional Statement.

The Order of a majority of the judges of the United States Court of Appeals for the First Circuit denying the suggestion of the United States and the State of Maine for rehearing *en banc* is not reported, and is reproduced at Appendix C of the Appellant State of Maine's Jurisdictional Statement.

The Opinion of the United States District Court for the District of Maine denying the Defendant's Motion to Dismiss the indictment is reported at 585 F. Supp. 393 (D.Me. 1984), and is reproduced at Appendix D of the Appellant State of Maine's Jurisdictional Statement.

The Report and Recommended Decision on Defendant's Motion to Dismiss the Indictment of the United States Magistrate for the District of Maine is not reported, and is reproduced at Appendix E of the Appellant State of Maine's Jurisdictional Statement.

Jurisdiction

In this case, the United States Court of Appeals for the First Circuit has held a statute of the State of Maine, 12 M.R.S.A. § 7613, which prohibits the importation of live bait fish into the State, invalid as repugnant to the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3. Accordingly, this Court has jurisdiction to review that decision on appeal pursuant to 28 U.S.C. § 1254(2).

The Opinion and Judgment of the Court of Appeals was entered on January 18, 1985; the petition of the United States and the State of Maine for rehearing was denied on April 10, 1985; the suggestion of the United States and the State of Maine for rehearing *en banc* was denied on April 11, 1985; and the State of Maine filed a notice of appeal therefrom on May 13, 1985. A copy of the notice is reproduced at Appendix F of the Appellant State of Maine's Jurisdictional Statement.

Constitutional and Statutory Provisions

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, provides, in pertinent part:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, . . .

The Lacey Act Amendments of 1981, 16 U.S.C. § 3371 *et seq.*, provide, in pertinent part:

> It is unlawful for any person —
>
> • • • •
>
> (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
>
> (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State . . . 16 U.S.C. § 3372(a).

Title 12, Maine Revised Statutes Annotated, Section 7613 provides:

> A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters.

Statement of the Case

I. *The Statutory Structure.*

In 1959, the Maine Legislature enacted "AN ACT Regulating Live Bait for Fishing," Laws of Maine of 1959, ch. 112, which, *inter alia,* prohibited the importation of live bait fish into the State. This prohibition now appears at 12 M.R.S.A. § 7613. In 1981, the Congress enacted the Lacey Act Amendments of 1981, Pub.L.No. 97-79, 95 Stat. 1073 (1981), codified at 16 U.S.C. § 3371, *et seq.,* which makes it a violation of federal law, *inter alia,* to import any fish into any State in violation of that State's laws. 16 U.S.C. § 3372(a)(2)(A). The purpose of the amendments, as revealed in the report of the Senate Committee hearing the bill, was to allow "the Federal government to provide more adequate support for the full range of State, foreign and Federal laws that protect wildlife." S. REP. No. 97-123, 97th Cong., 2d Sess. at 4, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748, 1751. The Maine statute is thus an example of the kind of statute which is directed at threats to the state's ecology and which the Lacey Act Amendments were intended to support.

II. *The Litigation.*

On February 24, 1983, the defendant in this case, Robert J. Taylor, was indicted in the United States District Court for the District of Maine for violating the Lacey Act and the Maine statute by importing over 158,000 golden shiners into the State of Maine, and for conspiring to do so in violation of 18 U.S.C. § 371. Joint Appendix (hereinafter "J.A.") at 8. On March 30, 1983, he moved to dismiss the indictment on the ground that the underlying statute, 12 M.R.S.A. § 7613, constituted an impermissible barrier to interstate commerce in violation of the Commerce Clause. J.A. at 13. Because the constitutionality of one of its statutes had been drawn into question, the State of Maine was entitled to notice, pursuant to 28 U.S.C. § 2403(b), of the pendency of the defendant's motion. Notice was given on June 16, 1983, and, on September 23, 1983, the State was permitted to intervene as a party to the action. J.A. at 17.

On November 9, 1983, a hearing was had on the defendant's motion before the Honorable D. Brock Hornby, United States Magistrate for the District of Maine. At the hearing, the State presented evidence that its statute, though concededly discriminating against interstate and foreign commerce, was constitutional in that it satisfied the requirements of *Hughes v. Oklahoma,* 441 U.S. 322 (1979) that a barrier to commerce may stand if it "serves a legitimate local purpose" and, if so, that no "alternative means" exist which "could promote this local purpose as well without discriminating against interstate commerce." *Id.* at 336. The thrust of the State's evidence, consisting of the testimony of three experts, including the State Fish

Pathologist, was that its statute was necessary to protect its small and unique fish population against the introduction of various specific parasites and exotic species of fishes, some of which were actually found in the defendant's shipment; and that an absolute prohibition, rather than an inspection program, was the only practicable means available to the State to defend itself, since the scientific community has not as yet developed satisfactory sampling and certification procedures for bait fish.[1]

On February 29, 1984, the Magistrate, after a thorough review of the evidence presented by all parties, determined that the State had met its burden of satisfying the *Hughes* test, that the statute was constitutional and that the indictment should not be dismissed. Jurisdictional Statement (hereinafter "J.S.") at Appendix E. The defendant then filed objections to the Magistrate's recommendations with the District Court; but, on April 25, 1984, the Court (Cyr., C.J.) entered an extensive opinion, entitled "Ruling on Magistrate's Report and Recommended Decision," which agreed with the Magistrate in all respects. *United States v. Taylor,* 585 F.Supp. 393 (D.Me. 1984); J.S. at Appendix D. The defendant then pleaded guilty, on June 28, 1984, to the indictment; was fined $3000 on each of its two counts; and appealed. J.A. at 6-7.

On January 18, 1985, the United States Court of Appeals for the First Circuit reversed, rejecting the factual findings of the Magistrate and the District Court and

[1]This evidence will be set forth in greater detail, with complete citations to the record, in Part II of this Brief, which demonstrates that the factual determinations of the District Court are supported by substantial evidence and are therefore not clearly erroneous.

finding instead that the State's purpose in enacting its statute was not legitimate and that alternative means for dealing with the problem (namely, an inspection program) existed. *United States v. Taylor,* 752 F.2d 757, 761-63 (1st Cir. 1985) (Maletz, J., sitting by designation); J.S. at A-7-A-10. Maine and the United States immediately petitioned the panel which decided the case for rehearing and suggested that the Court rehear the case *en banc,* essentially on the ground that the panel had impermissibly rejected the factual determinations of the District Court and had in effect re-tried the case itself. On April 10, 1985, the panel entered a Memorandum and Order denying the petition for rehearing, in which it declared itself "free to examine carefully the factual record and to draw its own conclusions," 752 F.2d at 764-765; J.S. at Appendix B. On April 11, 1985, a majority of the five members of the First Circuit denied the suggestion for rehearing *en banc.* J.S. at Appendix C.

On May 13, 1985, the State of Maine filed a notice of appeal of the First Circuit's decision to this Court. J.S. at Appendix F.[2] On July 9, 1985, the State filed its Jurisdictional Statement. Following the filing of the defendant's Motion to Dismiss or Affirm, the Solicitor General filed a brief on behalf of the United States agreeing with the suggestion in the Jurisdictional Statement that the case was appropriate for summary reversal. On November 4, 1985, this Court scheduled the case for plenary review in an order which postponed the question of jurisdiction until the hearing on the merits.

[2]The United States had previously filed a similar notice of appeal. J.A. at 311. However, on July 15, 1985, the United States moved the First Circuit to dismiss the appeal, J.A. at 313, which the Court did on July 16, 1985, J.A. at 315.

Summary of Argument

In this case, the Court of Appeals declared unconstitutional under the Commerce Clause a Maine statute, 12 M.R.S.A. § 7613, which prohibits the importation of live bait fish. The Court found that the Maine statute did not satisfy either element of the test enunciated by this Court in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), that State statutes which prohibit interstate commerce may stand only if (1) they serve a legitimate local purpose and (2) there are no practical alternatives to the prohibition.

This court has jurisdiction over this case pursuant to 28 U.S.C. § 1254(2), which accords a right of appeal to "a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States." (Part I of this Brief)

At a hearing before a United States Magistrate, the State introduced overwhelming, if not uncontradicted, evidence that its statute met both elements of the *Hughes* test. Therefore, the factual determinations of the District Court, which relied on that evidence in sustaining the statute, were not clearly erroneous. (Part II)

However, instead of applying the usual standard of review that lower court factual findings shall not be disturbed unless clearly erroneous, the Court of Appeals independently evaluated the evidence and found that the statute satisfied neither element of the *Hughes* test. It justified this departure from normal rules of appellate review of trial court actions on the ground that the case involved "mixed questions of law and fact" and that the presence of a constitutional question mandated a more

vigorous appellate inquiry. The case does not involve such mixed questions, however, nor is there any authority for the proposition that District Court factual determinations in Commerce Clause cases are entitled to less appellate deference than other such findings. Thus, the Court of Appeals applied an incorrect standard of review. (Part III)

Moreover, the degree of scrutiny to which the Maine statute should have been subjected is less than that which ordinarily prevails in Commerce Clause cases, because the Congress, in enacting the Lacey Act Amendments of 1981, encouraged the enactment of statutes such as Maine's. Thus, the Court of Appeals' adherence to a strict scrutiny approach in this case was incorrect, and constitutes an additional ground for reversal. (Part IV)

Argument

I. *This Court Has Jurisdiction over this Appeal.*

As set forth in the Statement of the Case, *supra*, the Court of Appeals in this case has declared a statute of the State of Maine, 12 M.R.S.A. § 7613, unconstitutional as violative of the Commerce Clause of the United States Constitution, in a case where the State is a party and is thus bound by the judgment. The case therefore fits squarely within the provisions of 28 U.S.C. § 1254(2), which provides, in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> • • •
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution . . . of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

The State of Maine, a party to the proceeding below, has relied, and wishes to continue to rely, on its statute to protect its environment and indigenous fish population from the introduction of parasites and exotic species. If the decision of the Court of Appeals stands, prosecutions under the Maine statute will be precluded, and the purposes of the statute frustrated. The State, therefore, is authorized by Section 1254(2) to bring this appeal.

In a brief filed on behalf of the United States in response to the State's Jurisdictional Statement, the Solicitor General, while agreeing that the case is covered by

the plain language of Section 1254(2), suggests a possible jurisdictional problem because, since the revision of the Criminal Appeals Act, 18 U.S.C. § 3731, in 1970, the Court's jurisdiction in federal criminal cases "has been confined to review by certiorari." Solicitor General's Brief (hereinafter "S.G. Brief") at 7-8, *quoting* R. Stern & E. Gressman, *Supreme Court Practice*, § 2.11 at 82 (5th ed. 1978).[3] Thus, the Solicitor General's brief suggests, an issue may exist whether Section 1254(2) should be read to be implicitly limited to civil actions, as other statutes governing appeals to this Court are so limited by their express terms (28 U.S.C. §§ 1252 and 1253).

The Solicitor General then suggests, however, that in the "unusual situation" presented here, where the validity of a federal indictment turns on the constitutionality of a state statute, there is no reason to read Section 1254(2) in any way other than in accordance with its plain language. S.G. Brief at 8. The State agrees with this suggestion and would add only that section 1254(2) has never been interpreted *not* to apply in criminal cases.[4]

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[3]The Solicitor General also notes that, because the prosecutor in this action, the United States, did not itself take an appeal, a controversy may no longer be present. S.G. Brief at 9-10. The Solicitor General then states, however, that the United States expressly disavows any intention to dismiss the indictment if the State were to prevail in this appeal, and that therefore the necessary adversity exists. The State agrees with this position. cf. *United States v. Nixon*, 418 U.S. 683, 696 (1974) (since the Attorney General has not, in fact, revoked authority of Special Prosecutor to subpoena Presidential records, live controversy between prosecutor and defendants exists).

[4]Indeed, the problem posed by the Solicitor General may not be a real one in the first place, since it is based upon a

(Continued on following page)

Beyond this, of course, the State would request that, if this Court somehow were to find itself without appellate jurisdiction under Section 1254(2), it should "regard the papers whereon the appeal was taken . . . as a petition for writ of certiorari," and grant the petition. 28 U.S.C. § 2103. *See, e.g., Aguilar v. Fenton*, — U.S. —, —, 105 S.Ct. 3232, 3236 (July 1, 1985).

(Continued from previous page)

rather broad statement of a commentator and not upon the text of the applicable statutes themselves. The 1970 amendments of the Criminal Appeals Act, which gave rise to the observations in the Stern and Gressman treatise, concerned the right of the government to appeal in cases *not* involving the constitutionality of a statute, and therefore did not amend Section 1254(2). The predecessor of Secion 1254(2) was first enacted in 1925, adding Section 240(b) of the Judicial Code of 1911, 43 Stat. 939. In this original form, Section 1254(2) applied to "any case" in which a Court of Appeals declared a state statute unconstitutional. In the same enactment, the Congress created the predecessor to Section 1254(1), which applies, as it does today, to "any case, *civil or criminal*." 43 Stat. 938. (Emphasis added). There is no indication why the words "civil or criminal" are present in the 1925 version of Section 1254(1), but not that of Section 1254(2), except that the phrase "civil or criminal" in Section 1254(1) has its origin in that subsection's predecessor in the Judicial Code of 1911, and has remained in the statute ever since. 36 Stat. 1157. Section 1254 was revised into its present form as part of the 1948 revision of the Judicial Code. 62 Stat. 928.

II. *The Determination of the District Court that the Maine Statute Serves a Legitimate Purpose That Cannot be Effected by Alternative Means Was Not Clearly Erroneous.*

The Maine statute at issue in this case concededly discriminates against interstate commerce. Thus, under the test set forth by this Court in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the statute will survive scrutiny under the Commerce Clause only if (1) it is shown to serve "a legitimate local purpose," and (2) it is demonstrated that there are no "alternative means" which "could promote this local purpose as well without discriminating against interstate commerce." *Id.* at 336. At the hearing before the United States Magistrate, the State of Maine introduced extensive expert testimony showing that (1) its statute was necessary to protect its small and unique wild fish population against various types of parasites and exotic aquatic species which could be introduced into the ecology through imported bait fish, and (2) the scientific community has not yet developed satisfactory sampling and certificate procedures for such fish, making any other method of dealing with the problem impracticable. The Magistrate found this evidence persuasive, see his Report and Recommended Decision, J.S. at E-5 to E-11, as did the District Court, 585 F. Supp. at 395-98; J.S. at D-3 to D-9.

On appeal, the Court of Appeals reevaluated the evidence and concluded (1) that the Maine statute "evinces an aura of economic protectionism," and (2) that an absolute prohibition is not the least restrictive means of protecting the State's ecology, since inspection programs, either at the border or at the point of origin of the bait fish, are available and feasible. 752 F.2d at 761-63; J.S.

at A-7 to A-10. As the State will show in this section of its Brief, these findings are completely at odds with the evidentiary record in this case.

A. The Evidence as to Legitimate Purpose Was Substantial.

On the question of the purpose behind the statute, the States presented the testimony of the State Fish Pathologist, Mr. Peter Walker, and two other experts that Maine has a fresh water fish ecology consisting of very pure and clean water, populated by just a few species of fish, including such desirable fish for human consumption as brook trout, lake trout, smallmouth bass, largemouth bass, and landlocked salmon. Transcript (hereinafter "Tr.") at 23-24, 68-70.[5] This environment is unique in the nation. Tr. at 69-70. In view of the value of this fishery, which is available to resident and non-resident fishermen alike, Maine has long been vigilant against the introduction of new species of fish into its environment which might carry with them parasites or disease injurious to native species or which might compete with native species for food or habitat to the latter's disadvantage. Thus, in 1959, in response to the importation into the state at that time of diseased smelt from New Hampshire, Tr. 66-67, the State passed the statute at issue in this case, banning the importation of live bait fish.

In demonstrating the continuing need for the statute, the State Fish Pathologist first identified three parasites commonly found in bait fish whose introduction into Maine could be harmful to its native fish. As summarized by the District Court, 585 F.Supp. at 395-96; J.S. at D-3 to D-5,

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[5]The entire transcript of the hearing before the Magistrate appears at pages 20 to 293 of the Joint Appendix. Citations to it in this Brief will be to the relevant page of the transcript itself, rather than to that of the Joint Appendix.

and the Magistrate, J.S. at E-6 to E-7, these parasites are: (1) *capillaria catastomi,* a small round worm which embeds itself in the lining of the fish's interior, slowing down its growth and, in some cases, killing it; (2) *pleistophora ovariae,* which destroys a female fish's reproductive capacity; and (3) *bothriocephalus opsalichthydis,* an Asian tapeworm, which also embeds itself in the lining of the fish's intestine, and by preventing it from digesting its food, kills it. Only the first of these has been found as yet in the wild in Maine, and then only since late 1983, but two of the three were found in the shipment seized from the Defendant in this case. Tr. 14-21, 43-44.

The State Fish Pathologist and a second scientific expert then testified that the importation of live bait fish also poses a threat of the introduction of exotic species into the state's environment. As summarized by the District Court, 585 F.Sup. at 396-97; J.S. at D-5 to D-7, and the Magistrate, J.S. at E-7 to E-8, the general problem presented by the introduction of exotic species is that, once established, they may compete with indigenous species for food and habitat, to the latter's detriment. Tr. at 24-30; 71-74. Moreover, it is often not possible to know what effects a new species will actually have on the state's ecology, unless substantial research is done in advance; but the damage done by the introduction of an exotic species may well be irreversible. Tr. at 28, 30. Accordingly, as the experiences elsewhere in the nation with the common carp demonstrate, Tr. at 26-27, the risks posed by allowing non-native species into a new environment are substantial.

In the face of this evidence, and apparently ignoring it completely, the Court of Appeals found that the Maine

statute "evinces an aura of economic protectionism," which casts "doubt on the legitimacy of local purpose." 752 F.2d at 761-62; J.S. at A-7 to A-8. While the State, of course, agrees that any statute whose purpose is to protect a state's economy from interstate or foreign competition is "abhorrent to the Commerce Clause," *Hughes v. Oklahoma,* 441 U.S. at 333, there is simply no evidence that such is the case here. The sole basis on which the Court of Appeals predicated its finding was a single paragraph of a twenty-six paragraph statement prepared by the Maine Department of Inland Fisheries and Wildlife in opposition to an effort (undertaken incidentally on behalf of Mr. Robert Taylor, the defendant in this case, prior to his violating the law (Tr. at 149)) to repeal the twenty-two-year old importation ban at the 1981 session of the Maine Legislature. The bulk of this statement, which appears in its entirety at pages 294 to 310 of the Joint Appendix,[6] consists of the substance of the testimony of Mr. Walker in this case: that the threat of parasites and exotic species to Maine's unique fishery is too great to warrant repeal of the prohibition. At the end of the statement, the following paragraph appears:

> In lieu of these facts, we can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states. (J.A. at 309-10)

As the Magistrate found, the main point to be made about this statement is that, on its face, it does not support

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[6]The entire statement was admitted into evidence at Tr. 151.

a charge of economic protectionism, but rather is simply an observation that any suggestion of "inadequate bait supplies in Maine [should not] require acceptance of the environmental risks of imports." J.S. at E-5 to E-6, n. 4. Moreover, he noted the statement is only that of a Maine administrative agency, and is therefore not cognizable as evidence of the intention of the state's legislature in enacting the statute at issue twenty-two years earlier. *Id.* And finally, the statement was only raised at the trial for the purpose of impeaching the credibility of the State's witness, Mr. Walker. Tr. at 62. Thus, the Magistrate's finding as to its relevance may be viewed, at bottom, as a determination that he found Mr. Walker's testimony credible —a finding not lightly to be reversed on appeal.[7]

In summary, therefore, the evidence as to the threat posed by the imposition of bait fish into Maine is overwhelming that that threat is real and potentially devastating to the State's environment. As the District Court concluded:

> The Magistrate correctly observed that the constitutional principles underlying the commerce clause cannot be read as requiring the State of Maine to set idly by and wait until potentionally irreversible environmental damage has occurred or until the scientific community agrees on what disease organisms are or are not dangerous before it acts to avoid such consequences.

585 F. Supp. at 397; J.S. at D-6.

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[7]Indeed, at the District Court level, the defendant did not even make an argument that the statute represented an economic protection measure in disguise, leaving that court to find the contention waived. 585 F.Supp. at 395, n. 5; J.S. at D-2 to D-3, n. 5. The Court of Appeals ignored this finding completely.

B. *The Evidence as to the Lack of Alternatives was Uncontradicted.*

On the question of whether a less restrictive alternative is available, the evidence relied on by the Magistrate and the District Court in support of their respective findings is not only overwhelming—it is uncontradicted. The issue on this point is essentially whether there are inspection methods available to Maine of which it has simply chosen not to avail itself. The District Court found:

> The Fisheries expert testified that there do not presently exist sampling and certification procedures for warm water bait fish. Tr. 31, 33, 38. This testimony is corroborated by another Government expert, *see* Tr. at 97-100, *and by the defendant's expert witness as well, see* Tr. 139, 140. The unavailability of such procedures is due primarily to disagreement among the scientific community. 585 F.Supp. at 398; J.S. at D-8. (emphasis added).

Similar findings were made by the Magistrate. J.S. at E-8 to E-11.

Nonetheless, the Court of Appeals without any reference to the record whatever, advanced three reasons why the lower court's findings should be rejected. First, the Court found it significant that certain other states have statutes establishing fish certification procedures. 752 F.2d at 762; J.S. at A-9. But none of these statutes, which were not cited either to the Court of Appeals or to the District Court by the defendant,[8] is pertinent to

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[8]The defendant did append to his brief in the Circuit a letter of the Mississippi State University Cooperative Extension Service dated September 20, 1983 addressed to fish farmers

(Continued on following page)

the issue of the practicability of the establishment of an inspection program for bait fish. Several of them (Wisconsin,[9] Utah,[10] and Virginia)[11] merely provide generally that fish may be imported into the state only with the permission of the appropriate state official, which may be granted in some cases after an inspection, but do not deal with bait fish in particular. Under such statutes, which are quite common around the country, the state official could deny a permit to import bait fish on the ground that no scientifically acceptable certification method has

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(Continued from previous page)

generally summarizing the regulatory regime concerning the importation of fish in the nineteen selected states. The Court cited this letter, which is not in the record of his case, as demonstrating that one of these nineteen states (Tennessee) has a regulation "providing for inspection of out-of-state fish." 752 F.2d at 763, n. 15; J.S. at A-9, n. 15. In fact, all that the letter says with regard to Tennessee is the following:

> Disease free certifications: Not required, fish may be inspected.

Thus, even assuming that the curious mode of proof of an uncited regulation of a sister state employed here is legally acceptable, the information provided hardly amounts to a showing of the existence and feasibility of a mandatory inspection program for bait fish.

[9]Wisc. Stat. Ann. § 29.535(1) (1973 and Supp. 1984). The Court cites subsection (c) of that statute which deals with stocking of fish only and does not mention a certification program. The main portion of the statute, however, does prohibit importation unless there has been an inspection by State Wardens and a permit issued. The only reference to certification occurs in subsection (d) dealing with salmonids.

[10]Utah Code Ann. § 23-15-12 (1976). This statute prohibits the introduction into state waters (not importation, as the Court's opinion states) of any aquatic wildlife without written permission.

[11]Va. Code 28.1-183.2 (1979).

been developed for such fish. Only one statute cited by the Court, that of Minnesota,[12] appears to address a type of bait fish (minnows) directly, but contrary to the statement by the Court at note 15, contemplates the issuance of a permit only for their *transportation* "into or through" the state for a period of 12 hours. Otherwise, importation for any other purpose is, as in Maine, prohibited.

Next, the Court suggested that "Maine could send its inspectors to hatcheries in other states and require the exporter to pay for such inspection."[13] 752 F.2d at 762; J.S. at A-9. But this proposal, which the Court acknowledged was raised by it for the first time *sua sponte* at oral argument, ignores the major thrust of Maine's case at trial; there is no inspection procedure anywhere in existence which can be employed, regardless of who pays for it.

Finally, the Court flatly stated that Maine could simply use the sampling techniques which it uses for other fish in establishing an inspection program for bait fish. 752 F.2d at 763; J.S. at A-10. Presumably, this statement refers to 12 M.R.S.A. § 7202, quoted at note 11 of the Court's Opinion, which provides for the importation of fresh water fish. But this statute, as an inspection of the diseases enumerated in it reveals, is directed only as salmonids, primarily trout and salmon: fish for which, the record establishes, valid scientific

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[12]Minn. Stat. Ann. § 101.46(6) (1977). A South Dakota statute cited by the Court, S.D. Codified Law § 41-14-30 (1977), contains an identical transportation prohibition, but does not address importation.

[13]The Court cites as an example of such a procedure Cal. Fish & Game Code § 6306 (1984) which concerns the expenses of *in-state* inspections.

sampling techniques exist. Tr. at 31-33. Again, the proposition which Maine demonstrated at trial—that no inspection procedure for bait fish exists—has not been refuted in the Court's Opinion.

* * *

In summary, the evidence presented by the State of Maine in satisfaction of both elements of the *Hughes* test was not only substantial, it was overwhelming, if not uncontradicted. The District Court's determinations, therefore, were not clearly erroneous. Indeed, it may well be said that if Maine cannot be found to have satisfied the *Hughes* test on this record, that test is one that no state can ever meet.

III. *The Failure of the Court of Appeals to Apply the Clearly Erroneous Test to the District Court's Factual Determinations Was Erroneous.*

In reviewing the factual determinations just summarized, the Court of Appeals declared that it was "free to examine carefully the factual record and to draw its own conclusions." 752 F.2d at 765; J.S. at B-2. This approach manifests a fundamental misunderstanding of the role of a Court of Appeals in reviewing the factual determinations of a District Court. As provided in Rule 52(a) of the Federal Rules of Civil Procedure and most recently articulated by this Court in *Anderson v. City of Bessemer City*, — U.S. —,'—, 105 S.Ct. 1504, 1511-13 (March 19, 1985), "Findings of Fact shall not be set aside unless clearly erroneous."[14] *See also Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, — U.S. —, —, 105 S.Ct. 2613, 2621, n. 8 (June 11, 1985). As demonstrated in the preceding portion of this Brief, the District Court's findings that the Maine statute is directed at a legitimate governmental purpose and that no alternative to its absolute prohibition as a means of furthering

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[14]It might be objected that the standard set forth in Rule 52(a) and *Anderson* is not applicable to this case because it is a criminal prosecution. The State would note in response that the issue presented here, whether Maine law violates the Commerce Clause, is not an element of a crime and thus the ordinary civil rules of review should apply. And even assuming that the standard of review of factual determinations in criminal cases is applicable, that standard is no different where, as here, there is no jury. *Campbell v. United States*, 373 U.S. 487, 493 (1963) ("[a] determination of [fact] by the district judge [in a criminal case] may not be disturbed unless clearly erroneous."). See Wright, *Federal Practice and Procedure*, § 374 at 17-18 (1969), discussing Rule 23(c), Fed.R.Crim.P.

that purpose exists are supported by substantial—if not overwhelming—evidence. They are not, therefore, clearly erroneous.

In reaching a contrary result, the Court of Appeals appears clearly to have been aware that it was departing from the usual standard of appellate review of District Court factual determinations. It justified that departure on two bases: (1) that in certain kinds of cases—such as, presumably, those arising under the Commerce Clause—a greater degree of review of District Court factual determinations is appropriate; and (2) that the finding under review was a "mixed finding of law and fact," thus entitling it to less deference by an appellate court. 752 F.2d at 764-65; J.S. at B-1 to B-2. Neither of these justifications can be supported.

The basis for the Court of Appeals' suggestion that the "circumstances" of the case warrant greater appellate review of the District Court's factual findings is somewhat unclear. The Court concedes that in "some circumstances . . . findings of fact should not be disturbed if supported by substantial evidence," citing this Court's decision in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983). It then cryptically states that this Court "often" must engage in more extended review, citing two other decisions, *Bacchus Imports, Ltd. v. Dias*, — U.S. —, —, 104 S.Ct. 3049 (June 29, 1984) and *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). Presumably, the Court is suggesting that while this Court has exercised restraint in reviewing under the Commerce Clause factual determinations in cases involving the application of so-called "unitary taxes," *e.g.*, *Container Corp.* and cases cited therein

at 164, it has not done so in other, more traditional Commerce Clause cases like *Bacchus Imports* and *Boston Stock Exchange*.

But this distinction does not dispose of the question of the appropriate standard to be applied in *this* case, for neither of the cases relied upon by the Court of Appeals concerned the standard of review to be applied by an appellate court to factual determinations under the Commerce Clause by lower courts.[15] No trial had occurred, either in *Bacchus Imports* or in *Boston Stock Exchange*.[16] In each case, the issue before the court was whether the tax in question was discriminatory against interstate commerce, a fact conceded here. The function which this Court performed was to examine each statute on its face, as well as its legislative history, to determine whether it had a discriminatory purpose or effect. There was no issue of the degree of deference to be accorded findings of fact by the trial court, since no such findings were made. Thus, the cases cannot provide support, as suggested by the

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[15]Nor does either of the cases involve the review of factual determinations of federal trial courts by federal appellate costs. In both *Bacchus Imports* and *Boston Stock Exchange*, this Court was reviewing the examination of a state statute under the Commerce Clause by that state's court of last resort. Thus, in each case, important considerations of federalism were present which do not exist here. For this additional reason, therefore, the cases are distiniguishable.

[16]In *Bacchus Imports*, the case was originally decided by the Hawaii Tax Appeal Court on a stipulation of facts. *Matter of Bacchus Imports, Ltd.*, 656 P.2d 724, 728 (Haw. 1982). In *Boston Stock Exchange*, the trial court disposed of the case on a motion to dismiss. 429 U.S. at 328.

Court of Appeals, for a power to examine the record independently in this case.[17]

As for the Court of Appeals' suggestion that the standard of review in this case should be different because "the district court's finding that Maine's statute provided the least discriminatory alternative was a mixed finding of law and fact," the State respectfully disagrees. The District Court found, on the alternatives issue, that "The real problem is the absence of standardized sampling and certification procedures for bait fish," and that, although the development of such procedures is theoretically possible, "the *fact* remains that testing procedures has not yet been devised." 585 F. Supp. at 398; J.S. at D-8 to D-9 (emphasis added). This determination, as the District Court itself stated, is one of fact. From it, the Court reached the legal conclusion that the State had satisfied the third requirement of the *Hughes v. Oklahoma* test. The Court of Appeals is, of course, at liberty to review the conclusion that the facts as found are sufficient to satisfy the legal standard at issue. It is not, however, "free" (in its words) to question the truth of the facts as found, so long as they are supported by substantial evidence. In this case, as set forth in more detail above,

[17]The situation might be different if the constitutional provision in question were contained in the Bill of Rights. *See Contaner Corp.* at 176, n. 13, *citing Brooks v. Florida*, 389 U.S. 413 (1967) (Fifth Amendment right against self-incrimination) and *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964) (First Amendment right of freedom of the press). In this case, however, it is only necessary to decide whether the assertion of a violation of the Commerce Clause in federal court entitles an appellant to more than the usual degree of appellate review in the Court of Appeals.

not only is the absence of a certification or inspection program supported by substantial evidence, it is, as the District Court found, uncontroverted. 585 F. Supp. at 398; J. S. at D-8. Thus, whatever a "mixed question of law and fact" is,[18] it is not present here. Accordingly, the Court of Appeals' second justification for departure from the usual rules of appellate review of District Court factual determination is unpersuasive.

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In summary, rather than applying the clearly erroneous test, the Court of Appeals in this case determined to re-try the case itself, and not only re-evaluated the evidence in the record, but even invented hypothetical fact situations of its own in an effort to show that the State's evidence was inadequate. Moreover, it failed to justify this departure from the normal rules of appellate review of factual determinations. As this Court long ago stated:

> Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will

[18]As the cases cited by the Court of Appeals indicate, this Court has had frequent difficulty with "the vexing nature" of the distinction of law from fact. *Bose Corp. v. Consumers Union of the United States*, — U.S. —, —, 104 S.Ct. 1949, 1960 (April 30, 1984), *citing Pullman-Standard, Inc. v. Swint*, 456 U.S. 273, 288 (1982). But, as this Court stated in the very footnote relied on by the Court of Appeals, "what *Baumgartner* [*v. United States*, 322 U.S. 665 (1944)] may have meant by its discussion of 'ultimate facts' [an alternative formulation of the concept of a mixed question of law and fact], it surely did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a)." *Id.* at 286-87, n. 16.

re-examine, as a court of first instance, findings of fact supported by substantial evidence.

Norton Co. v. Department of Revenue, 340 U.S. 534, 537-38 (1951), *quoted with approval in Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 176 (1983). For this reason alone, therefore, the Court of Appeal's decision should be reversed.

IV. *The Degree of Commerce Clause Scrutiny to which the Court of Appeals Subjected the Maine Statutes Was Erroneous.*

In the preceding section of this Brief, the State demonstrated that the Court of Appeals failed to apply the correct standard of appellate review in this case. If this Court should somehow find, however, that the Court of Appeal's decision is not invalid for this reason, that decision should nevertheless be reversed because the Court failed to take into account the effect on this case of the action of Congress in enacting the Lacey Act Amendments of 1981.

As the Court of Appeals correctly noted, the Commerce Clause, in addition to constituting "an affirmative grant of power to Congress to regulate interstate and foreign commerce," also operates as "an implied limitation on state power." 752 F.2d at 760; J.S. at A-4 to A-5, *quoting South-Central Timber Dev., Inc. v. Wunnicke,* — U.S. —, —, 104 S.Ct. 2237, 2240 (May 22, 1984) and *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 769 (1945). Thus, under ordinary circumstances, if a statute is shown to discriminate against interstate commerce either in purpose (as here or as in, *e.g., Hunt v. Washington Apple Advertising Comm'n.,* 432 U.S. 333 (1977)) or in practical effect, (*e.g., Minnesota v. Clover Leaf Creamery Co.,* 449 U. S. 456 (1981)), it will be subjected to judicial scrutiny under the *Hughes v. Oklahoma* test set forth above.

However, as the Court of Appeals also recognized, state barriers to interstate commerce may also be "resuscitated at the will of Congress." 752 F.2d at 763, J.S. at A-10. In this case, subsequent to the enactment of the

Maine statute, the Congress passed the Lacey Act Amendments of 1981, Pub.L.No. 97-79, 95 Stat. 1073 (1981), *enacting, inter alia,* 16 U.S.C. § 3371 *et seq.,* making it a violation of federal law for any person to transport fish or wildlife in interstate commerce in violation of state law. 16 U.S.C. § 3372(a)(2)(A). In passing the Amendments, the Congress was addressing what it termed "a massive illegal trade in fish and wildlife" which threatens "grim environmental consequences." S.REP. No. 97-123, 97th Cong., 2d Sess. at 1, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1748. Accordingly, it found that

> It is desirable to extend protection to species of wildlife not covered by the Lacey Act, and to plants which are presently not covered at all. States and foreign government [sic] are encouraged to protect a broad variety of species. *Legal mechanisms should be supportive of those governments.*

Id. at 3-4; 1750-51. (emphasis added).

Throughout the proceedings below, the State of Maine took the position that the Lacey Act Amendments constituted Congressional validation of all such state laws, thus insulating them completely from Commerce Clause scrutiny. The Magistrate, while allowing that the "statute could be read to support [this] position," determined that since no suggestion can be found in either the text of the statute or in its legislative history that the Congress intended to immunize state fisheries and wildlife laws from constitutional attack, "the Lacey Act Amendments cannot be considered as automatically validating state legislation on the fish trade." J.S. at E-3 to E-4. The District Court agreed, 585 F. Supp. at 394, n. 3; J.S. at D-2, n. 3,

as did the Court of Appeals, 752 F.2d at 763-64, J.S. at A-10 to A-14.

But a determination that Congress did not unmistakably provide that state statutes not be subjected to Commerce Clause scrutiny does not lead to the opposite conclusion, adopted by the Court of Appeals, that they should remain subject to the strictest of scrutiny as if Congress had never acted. This is the position taken by the defendant in this case; in his Motion to Dismiss or Affirm filed in response to the State's Jurisdictional Statement, he argues that the principal reason the Court of Appeals' decision should be sustained is that, among all of the courts below examining the Maine statute, it was the only one truly to apply the "strict scrutiny" test mandated by *Hughes v. Oklahoma.* Defendant's Motion to Dismiss or Affirm at 5-6. The State, while not conceding that its statute would not survive such scrutiny (see Parts II and III of this Brief), contends that the application of strict scrutiny here is inconsistent with the Lacey Act and therefore mandates reversal of the Court of Appeal's decision.

The legislative history of the Lacey Act Amendments is replete with expressions of Congressional concern over the degradation of the nation's environment which may result from unregulated movement of fish and wildlife throughout the country.[19] However, the Congress con-

[19]In addition to the portions of the Senate Report quoted above in this section of this Brief, see those quoted by the Magistrate, J.S. at E-3 to E-4 (Amendments necessary to protect endangered species and insure healthy wildlife population) and by the Court of Appeals, 752 F.2d at 763-64, n. 21 and 22; J.S.

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cluded that direct national regulation was not desirable. S.REP. No. 97-123, 97th Cong., 2nd Sess. at 4, *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 1751. Thus it settled on an approach whereby existing and future state statutes would be used as the medium by which specific harms would be dealt with. Implicit in this approach is the assumption that the states would more easily be able to identify particular threats to their respective environments and to formulate appropriate responses to those threats than would the federal government. Thus, the Congress determined to provide "a tool to aid the states in enforcing their own laws" by making it a federal crime to transport fish or wildlife in interstate commerce in violation of them. *Id.* at 2; 1751. As quoted above, "States and foreign government [sic] are encouraged to protect a broad variety of species. Legal mechanisms should be supportive of those governments." *Id.* at 3-4; 1750-51.

It would be odd, indeed, if one of those "legal mechanisms," the federal courts, were to frustrate this clearly expressed Congressional purpose by continuing to subject state laws coming within the purview of the Lacey Act Amendments to strict constitutional scrutiny under the

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at A-10 to A-14, n. 21 and 22 (Amendments necessary to counteract involvement of professional criminals in the fish and wildlife trade and to protect important economic interests). And with particular relevance to this case, see the portion of the Report quoted by the Court of Appeals demonstrating how a predecessor statute to the Amendments, the Black Bass Act, was inadequate to assist one state in preventing the introduction of an undesirable exotic species into its waters. 752 F.2d at 764; J.S. at A-13.

Commerce Clause as if the Congress had never acted.[20] Accordingly, the State would suggest that, if this Court determines that Congress may not have intended to insulate Maine's statute from judicial scrutiny altogether, the policy which Congress sought to serve by enacting the Lacey Act Amendments must be accommodated by a lesser degree of scrutiny than that required under the *Hughes* test.

The problem which this case presents is what that standard should be. Under ordinary circumstances, as the Court of Appeals recognized, the policy behind the Commerce Clause, as modified by the *Hughes* test, dictates that a state may only discriminate against interstate commerce to protect its ecology if there is no less discriminatory measure to afford this protection. Thus, for example, if an inspection program for imported fish is available, a state would be obliged to implement it, rather than erecting an outright barrier, no matter how expensive or administratively burdensome the inspection program proved. In addition, the Commerce Clause, as applied by the Court of Appeals here, would oblige the State to refute not only any evidence introduced at trial to the effect that practical alternatives exist, but also any hypothetical suggestions raised by another party, or even, as occurred here, by the court.[21]

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[20]It is, of course, true that, as the Court of Appeals pointed out, any lessening of scrutiny under the Commerce Clause would not shield a state statute from review under some other constitutional provision, particularly one "whose operation cannot be forestalled by congressional consent." 752 F.2d at 757, n. 19; J.S. at A-11, n. 19. But no other challenge has been made to the Maine statute.

[21]In this case it was the Court of Appeals, rather than the trial court, which raised the hypothetical alternatives. Thus, the

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As just demonstrated, however, the policies underlying the Lacey Act Amendments to be effectuated require a diminution of these burdens on the states. Thus, on the issue of whether the state statute is in furtherance of a valid purpose, all state laws encompassed by the Act should be found presumptively legitimate. Under this standard, a person challenging the constitutionality of such a statute would still be permitted to introduce evidence that the law is not what it seems on its face, but is instead an economic protection measure in disguise. But in the absence of such evidence, as is the case here, the statute should be presumed to satisfy the "legitimate purpose" requirement of the *Hughes* test.

In addition, with regard to the state's obligation to show an absence of alternatives, a state should be accorded more administrative leeway under the Act than a strict application of the *Hughes* test would require. A statute should be upheld if a state could show that while a regulatory program of some kind—as opposed to a prohibition—in the abstract may be possible, its expense or burdensomeness is so great that it should not be required. In other words, the Lacey Act should be viewed as allowing the courts to harmonize the national interest declared by the Commerce Clause against "economic Balkanization" with

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State had no opportunity to introduce evidence to rebut them. Accordingly, if this Court were to find that some hypothetical practical alternative to a prohibition remained open in spite of the State's evidence that none exists (a finding which the State contends is not possible on the record in this case (See Part IIB of this Brief)), the remedy should be not the invalidation of the statute but a remand of the case to the District Court to permit the State to introduce, if it can, additional evidence as to why the hypothetical cannot be a reality.

the national interest declared by the Act against the spread of environmental degradation. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, — U. S. —, —, 105 S.Ct. 2613, 2618-19 (June 11, 1985) (Sherman Act and Securities Exchange Act harmonized). In this case, of course, no such balance need be struck, because the evidence is unequivocal that no practical alternatives to a prohibition exist. But in the event that such an alternative should be found, a state should not be necessarily required to employ it, as if the Lacey Act had never been enacted.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPELLEE'S

BRIEF

No. 85-62

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MAINE, APPELLANT

v.

ROBERT J. TAYLOR AND UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS APPELLEE SUPPORTING APPELLANT

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QUESTIONS PRESENTED

1. Whether, pursuant to 28 U.S.C. 1254(2), this Court has appellate jurisdiction to review the constitutional question presented in this case.

2. Whether the State of Maine's blanket statutory ban against importation into Maine of "any live fish * * * commonly used for bait fishing" is invalid under the Commerce Clause of the United States Constitution, thus necessitating dismissal of a federal indictment charging a violation of the Maine statute as assimilated by Section 3(a)(2)(A) of the Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2)(A).

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OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A1-A14) is reported at 752 F.2d 757. The opinion of the district court (J.S. App. D1-D9) is reported at 585 F. Supp. 393. The recommended decision of the magistrate (J.S. App. E1-E12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1985. A petition for rehearing was

denied on April 10, 1985, as corrected by order of April 11, 1985 (J.S. App. C1-C2). The State of Maine filed a notice of appeal to this Court on May 15, 1985 (J.S. App. F1), and the jurisdictional statement was filed on July 9, 1985. On November 4, 1985, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).[1] See discussion at pages 11-14, *infra*.

STATEMENT

1. A Maine statute, Me. Rev. Stat. Ann. tit. 12, § 7613 (1981), prohibits importation into Maine of "any live fish * * * commonly used for bait fishing in inland waters." Section 3(a)(2) and (A) of the Lacey Act Amendments of 1981, 16 U.S.C. 3372(a)(2) and (A), "assimilates" Maine's statute by making it a federal crime "to import, * * * transport, sell, receive, acquire, or purchase in interstate * * * commerce * * * any fish * * * taken, possessed, transported, or sold in violation of any law * * of any State."

The United States, an appellee in this Court (see Sup. Ct. R. 10.4), initiated this federal prosecution against appellee Robert J. Taylor, a resident of Maine who produces and sells live bait fish.[2] On February 24, 1984, a grand jury in the District of Maine returned a two-count indictment charging that Taylor had imported, and had conspired to import, into Maine golden shiners, which are commonly used for bait fishing (J.S. 4; J.S. App. D1 & n.2, E1). The federal indictment specified that Taylor's conduct, by breaching the state ban against importing live bait fish, violated the Lacey Act and also violated the federal conspiracy statute, 18 U.S.C. 371.[3] Taylor moved to dismiss the indictment, contending that the State's import ban placed an impermissible burden on interstate commerce in violation of the Commerce Clause. J.S. 4; J.S. App. D1-D2. Thereafter, pursuant to 28 U.S.C. 2403(b), the district court allowed the State of Maine, the appellant here, to intervene in support of its statute's constitutionality.

2. A hearing on Taylor's motion to dismiss was held before a magistrate. The key issues were whether the exclusion of out-of-state bait fish served a legiti-

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[1] The United States filed a protective notice of appeal to this Court on May 10, 1985 (J.A. 311-312). Thereafter, the Acting Solicitor General determined not to pursue the appeal, and the court of appeals granted the United States' motion to dismiss its appeal on July 16, 1985 (J.A. 315).

[2] Taylor had previously been convicted in state court for a prior violation of the Maine statute. No. 15571 (Me. 9th Dist. Ct. Feb. 8, 1979). He was fined $500, the maximum fine permitted under state law. In 1980, Taylor approached the state legislature urging repeal of the live bait fish law (Tr. 149).

[3] The United States Attorney brought this Lacey Act prosecution as a felony. Subsequent to the commencement of this action, the Justice Department revised its United States Attorneys' Manual regarding Lacey Act felony charges. The current policy, rooted in concern for oversight of the elevation of state misdemeanors to federal felonies, requires prior review at the Department level. Congress plainly intended that, where interstate commercial transactions above a certain threshold are concerned, certain state law violations should be charged as felonies in appropriate cases. However, it is the policy of the Department of Justice that prosecutorial discretion must be very carefully and consistently exercised in such cases to ensure that the sanction sought is in proportion to the facts and circumstances underlying the offense committed.

mate local purpose, unrelated to economic protectionism, and whether less restrictive methods short of a complete ban could accomplish that same purpose. Three scientific experts testified for the prosecution, and one scientific expert testified for the defense. Maine's three experts were Peter Walker, the State fish pathologist since 1979; Dr. W. Harry Everhart, a Professor of Zoology at the University of Maine; and Dr. John Plumb, an Associate Professor in the Department of Fisheries at Auburn University in Alabama. The defendant's expert was Dr. Robert C. Summerfelt, Chairman of the Department of Animal Oncology at Iowa State University.[4] The prosecution experts demonstrated that Maine's small and unique wild fish population, including its own indigenous golden shiners,[5] would be placed at risk by three types of parasites prevalent in bait fish found outside of Maine.[6] Indeed, two such parasites were found in

[4] Walker testified that he has a certificate of advanced study in fish pathology (Tr. 9); Dr. Everhart has been a professor of zoology for 19 years and at one time was the Chief of Fisheries for the Maine Department of Inland Fisheries and Game (Tr. 65); and Dr. Plumb is an expert in infectious diseases in fish (Tr. 92-94). The defense expert, Dr. Summerfelt, stated that he is not a certified fish pathologist (Tr. 104) and that he is not familiar with Maine's fisheries (Tr. 131).

[5] Expert testimony at the hearing indicated that Maine's golden shiner is biologically different from its southern counterpart. Tr. 18.

[6] The three parasites, prevalent in bait fish from the southeastern United States, are Capillaria catastomi, a small round worm that can kill the fish; Pleistophera ovariae, a disease organism that destroys the ability of a female fish to reproduce; and Bothriocephalus opsalichthydis, an Asian tapeworm that can kill the fish (J.S. App. A3, D3-D5).

The defense expert opined that these and other organisms associated with warm-water bait fish are not considered as

the out-of-state golden shiners comprising Taylor's confiscated shipment (J.S. App. D4).

As Walker testified, none of these parasites are common to the wild fish population in Maine (Tr. 15, 19, 21), and their introduction to the State could have a detrimental impact on Maine's fish (Tr. 21). For example, in discussing the impact that Bothriocephalus opsalichthydis (as Asian tapeworm) could have on the domestic fish population, Walker noted that (*ibid.*) "this worm has no host specificity, it has no preference as to what kind of fish it [a]ffects * * * [and] if it were to become established in Maine * * * it would have an adverse effect upon [Maine's] wild fish populations * * *."

The prosecution also produced evidence demonstrating the adverse impact that exotic species, *i.e.*, non-native species commingled with shipments of live bait fish, could have on Maine's ecology. Specifically, the experts cited the effect of rivalry from exotic species on Maine's unique landlocked salmon population and its limited food resources and habitat for native fisheries (Tr. 71, 72).[7] As Walker explained (Tr. 23-24):

serious as disease organisms found in cold-water fish. As the district court noted (J.S. App. D7), however, the opinion of the defense expert was based on studies of hatchery fish, not wild fish (the focus of Maine's concern), nor did it involve, "to any significant degree," studies of cold-water fish. The district court also found that the defense expert was unacquainted "with the wild fish population of Maine or the northeast" (*ibid.*).

[7] Dr. Everhart testified that the introduction of non-native exotic species could result in either competition for food or the destruction of a species if an exotic fish is a new predator. Tr. 71, 72.

> [T]he Maine fish communities are rather unique among the eastern states. The state of Maine during the ice age was pretty much scoured clean of ice and glaciers where golden shiners resided. The state was recolonized by the comparatively small number of fish. In the state of Maine we have very pure and clean waters in most of our lakes—this differs from lakes further south—and they were populated by a rather delicate community of just a few species of fish * * *. We had a balance of just a few fish species which are not able to compete with other fish species * * *.

Similarly, Dr. Everhart explained (Tr. 69) that "we are dealing with a limited productivity and any introduction of a competitor in any way would be enough to upset the ecosystem or the total environment."

The prosecution experts further testified that there is currently no scientifically accepted procedure to inspect incoming shipments of live bait fish for disease organisms or for commingled exotic species. The minute size of the bait fish (70 specimens per pound) prevents inspection of each fish in a shipment; indeed, a single shipment may contain hundreds of thousands of fish.[8] Even apart from the problem of size, the bait fish could not survive the ordeal of individual inspection: the fish must be killed to be tested for parasite infestation. Moreover, there are no scientifically accepted sampling procedures that would permit the selection of a representative number of fish in a shipment for testing.[9] A disease-free certification

[8] Taylor's confiscated shipment contained 158,000 fish (J.S. App. E9 n.7).

[9] As Dr. Plumb noted (Tr. 97), although there are accepted testing procedures for salmonid fish, there are no scientifically accepted techniques for testing live bait fish, and therefore, "the comparison between the two is sort of apples and oranges."

program at the out-of-state point of origin would be equally unworkable, because the same unsound testing and sampling procedures would have to be used. J.S. App. D8-D9, E9; Tr. 45, 46.

The district court accepted the magistrate's report and recommendation to deny Taylor's motion to dismiss and issued an opinion upholding the constitutionality of the Maine statute (J.S. App. D1-D9). The district court held that, although the Maine statute was facially discriminatory (as Maine and the United States conceded), it still met the requirements of *Hughes* v. *Oklahoma*, 441 U.S 322 (1979).[10] The court reasoned that the statute was a permissible burden on interstate commerce because (1) the United States and the State of Maine demonstrated a legitimate and substantial purpose in prohibiting the

[10] In *Hughes*, 441 U.S. at 336, this Court adopted the following test to be applied to state statutes alleged to violate the Commerce Clause:

> (1) whether the challenged statute regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical effect;
>
> (2) whether the statute serves a legitimate purpose; and, if so,
>
> (3) whether alternative means could promote this local purpose as well without discriminating against interstate commerce.

See also *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Once a statute is determined to be discriminatory, the state has the burden of justifying the local benefits and the lack of less discriminatory alternatives. *Hughes*, 441 U.S. at 336.

importation of live bait fish,[11] and (2) the expert evidence presented by the government demonstrated the lack of less discriminatory alternatives (J.S. App. D7-D9).[12] After his motion to dismiss was denied, Taylor entered a conditional plea of guilty (Fed. R. Crim. P. 11(a)(2)), and the district court fined him $3,000 on each of the two counts (J.A. 6).

3. The court of appeals concluded that the Maine statute violates the Commerce Clause; it therefore reversed and remanded the case with directions to dismiss the indictment (J.S. App. A1-A14). First, the court questioned—but did not decide—the legitimacy of the local purpose and Maine's characterization of its statute as a wildlife protection law. Although it did not rest its decision on this ground, the court suggested that the State's real purpose was economic protectionism (*id.* at A7-A8).[13] Even assuming that

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[11] This Court has already recognized a state's interest in preserving its environment as a legitimate local purpose. In *Hughes*, the Court acknowledged that Oklahoma's interest in preserving the ecological balance in its waters by restricting the removal of large numbers of minnows might well qualify as a legitimate local purpose. The Court characterized a state's interest in conservation and protection of wild animals as similar to the interest in protecting the health and safety of its citizens. *Hughes*, 441 U.S. at 337.

[12] The district court rejected Maine's alternative argument that the Lacey Act Amendments automatically validate state laws enacted for the protection or conservation of wildlife. The court agreed with the magistrate's conclusion that the legislative history of the Lacey Act Amendments did not demonstrate a clear and express congressional intent to insulate such state legislation from attack under the Commerce Clause. J.S. App. D2 n.3, E11.

[13] To support its view that the legitimacy of Maine's local purpose was in doubt, the court of appeals relied on one line from a statement prepared by one of Maine's experts in 1981 in connection with a proposed repeal of the prohibition on the importation of live bait fish. The statement (J.S. App. A4), suggesting that more could be done to promote a local bait fishery industry, was interpreted by the court of appeals as evidence of economic protectionism. However, the court of appeals quoted the statement out of context. The magistrate, on the other hand, examined the entire document of which the statement was but a minor part and concluded that, in context, the statement was made to "counter the argument that inadequate bait supplies in Maine require[d] acceptance of the environmental risks of imports." *Id.* at E5-E6 n.4. See J.A. 294-310. In addition, expert testimony at the hearing before the magistrate revealed that Maine's statute was originally enacted in the late 1950's in response to the State's fear of parasite disease in smelts that were being imported from New Hampshire (J.S. App. E6; Tr. 66-67).

the statute serves a legitimate local purpose, however, the court held that Maine did not meet its burden of proving the lack of less discriminatory alternatives (*id.* at A8-A10). The court also rejected Maine's contention that the state statute was validated by congressional consent as evidenced by passage of the Lacey Act Amendments of 1981, 16 U.S.C. (& Supp. II) 3371 *et seq.* (J.S. App. A10-A14).

SUMMARY OF ARGUMENT

1. This case falls within this Court's appellate jurisdiction under 28 U.S.C. 1254(2) because a state statute has been invalidated as unconstitutional by a federal court of appeals. The plain language of Section 1254(2) encompasses this case, even though it is a criminal case in which the validity of a federal indictment turns on the constitutionality of a state statute. While other statutes that invest this Court with appellate jurisdiction are expressly limited to

civil actions (28 U.S.C. 1252, 1253), the appellate jurisdiction conferred by Section 1254(2) contains no such restriction and there is no reason to construe it to apply only to civil actions.

In addition, the State of Maine has standing to pursue an appeal in the absence of a separate appeal by the United States. Reversal of the decision below would result in an automatic reinstatement of the indictment and the conviction since appellee Taylor's guilty plea was conditioned only on the reservation of his challenge to the constitutionality of the Maine statute. It would be contrary to the purpose of 28 U.S.C. 2403(b), the provision under which Maine intervened to defend the constitutionality of its statute, to preclude Maine from seeking appellate review in the circumstances of this case.

2. On the merits, the United States submits that the court of appeals erred, first, in failing to apply the correct standard of appellate review. The court of appeals erroneously reexamined the trial court's findings of fact on the lack of less discriminatory alternatives—findings that were based on substantial evidence showing that Maine's statute is constitutional. It was only by disregarding the appropriate standard of review (the clearly erroneous standard) that the court of appeals reached its decision to reverse.

Moreover, the court of appeals did not sufficiently consider—as it was required to do—the serious consequences to Maine's environment and ecology of invalidating the challenged statute. Where, as here, the state has presented substantial scientific evidence demonstrating the reasons for its fears of ecological harm, it should not be required to bear the unnecessary risk that could result from the importation of live bait fish.

ARGUMENT

I. THIS COURT HAS APPELLATE JURISDICTION UNDER 28 U.S.C. 1254(2) SINCE A STATE STATUTE HAS BEEN HELD UNCONSTITUTIONAL BY A FEDERAL COURT OF APPEALS

A. The Plain Language Of 28 U.S.C. 1254(2) Establishes This Court's Appellate Jurisdiction

Maine invokes the appellate jurisdiction of this Court under 28 U.S.C. 1254(2). That Section provides as follows:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> * * * * *
>
> By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented[.]

This case fits comfortably within the plain language of Section 1254(2) since Maine seeks review of the court of appeals' judgment that Me. Rev. Stat. Ann. tit. 12, § 7613 (1981), violates the Commerce Clause. We note, however, that Section 1254(2), which has seldom been construed, is unique among the statutes defining this Court's appellate jurisdiction. In particular, the other statutes that invest this Court with appellate jurisdiction to review the judgments of lower federal courts (28 U.S.C. 1252, 1253) are limited, by their terms, to "civil actions." Thus, one leading treatise has stated the general rule that, ever since the Criminal Appeals Act, 18 U.S.C.

3731, was revised in 1970, this Court's jurisdiction in federal criminal cases "has been confined to review by certiorari of the decisions of the courts of appeals." R. Stern & E. Gressman, *Supreme Court Practice* § 2.11, at 82 (5th ed. 1978). In contrast to civil cases involving the constitutionality of a federal statute, the authors observe that this limitation holds true even if the "dismissal of an indictment or information is premised on the invalidity or unconstitutionality of the federal statute upon which the indictment or information is based." *Id.* at 81 (footnote omitted).

This case is unusual, however, and does not seem to fit within that general rule. Although the case is a federal criminal prosecution, the only issue before this Court is the constitutionality of a state statute. There is no indication that Congress contemplated this remarkable situation. Accordingly, the consideration given by Congress to the proper mode of review in federal criminal cases involving the constitutionality of *federal* statutes (see R. Stern & E. Gressman, *supra*, § 2.11, at 79-82) would seem to have no applicability to this case. In these circumstances, the Court should be guided by the plain language of Section 1254(2), which does not limit jurisdiction to "civil actions." Notwithstanding the general rule that statutes authorizing appeals to this Court are to be strictly construed (see, *e.g.*, *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 246-247 (1984)), we can see no occasion for reading into Section 1254(2) words of limitation (*i.e.*, "civil actions") that are conspicuously absent from the statute.[14] Where Congress

[14] Another anomaly to be noted here is that neither the Rules of this Court nor the United States Code specifies any time limit for the filing of a notice of appeal in a criminal case

has sought to impose such a limitation (*e.g.* 28 U.S.C. 1252, 1253), it knows how to say so and has expressed the restriction in the statutory language.

Moreover, a literal reading of Section 1254(2) does not result in a situation where "the sense of the statute and the literal language are at loggerheads." *Heckler* v. *Edwards*, No. 82-874 (Mar. 21, 1984), slip op. 8. In *Heckler* v. *Edwards*, which arose under Section 1252, the Court observed that "to give the surface literal meaning to a jurisdictional provision would confer upon this Court a jurisdiction beyond what 'naturally and properly belongs to it.'" Slip op. 8. A literal reading of Section 1252 would have given a party the right to a direct appeal to this Court from any district court judgment in a case involving the constitutionality of a federal statute, even if the constitutional question was not decided in the judgment or raised on appeal. The Court concluded—with abundant support in the legislative history—that such a result was contrary to the "commonsense view that the constitutional holding must be at issue for direct review in this Court to lie" (slip op. 9).[15]

invoking jurisdiction under Section 1254(2). See 28 U.S.C. (& Supp. I) 2101. Again, this fact suggests that Congress did not contemplate the situation presented by this case; it does not, in our view, furnish grounds for concluding that appellate jurisdiction is lacking. Maine filed its notice of appeal within 30 days (exclusive of a final weekend) of the court of appeals' denial of rehearing. Since there is no category of cases requiring the filing of a notice of appeal in less than 30 days, Maine's notice should be deemed timely.

[15] The legislative history of Section 1254(2) provides little enlightenment for the present case. But the history of its statutory predecessor, Section 240(b) of the Act of Feb. 13, 1925 (Judges Act), ch. 229, § 1, 43 Stat. 938, demonstrates that some members of Congress were concerned that the Judges Act (in its draft form) would provide for direct

In contrast to the situation in *Heckler* v. *Edwards*, it is evident that the Court's jurisdiction under Section 1254(2) is limited to the constitutional question at issue. No inference could be drawn from Section 1254(2) that Congress intended to confer independent jurisdiction on this Court for issues collateral to statutory unconstitutionality, thereby expanding the Court's mandatory jurisdiction. Therefore, there would appear to be no need for the Court to construe Section 1254(2) to preclude review by appeal of a decision in a federal criminal case invalidating a state statute as unconstitutional. See 2A N. Singer, *Sutherland Statutory Construction* § 46.05, at 92 (C. Sands 4th ed. 1984). Indeed, applying Section 1254 (2) to such a case would be consonant with the Section's evident purpose of assuring a right to appellate review by this Court of federal court decisions invalidating state statutes.

B. The State Of Maine Has Standing To Maintain This Appeal Although The United States Did Not Appeal

Yet another jurisdictional peculiarity is presented by this case. Although this is a federal criminal prosecution, the sole appellant in this Court is the State of Maine, an intervenor in the district court.[16] Be-

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appeal of a state's highest court's decision sustaining the constitutionality of a state statute, but only for discretionary review by writ of certiorari when a federal court of appeals' decision invalidated a state statute. 66 Cong. Rec. 2755 (1925) (remarks of Sen. Copeland). To overcome this objection, the predecessor of Section 1254(2) was amended in a fashion that is consistent with the present statute. 43 Stat. 939. See 66 Cong. Rec. 2919 (1925) (remaks of Sen. Cummins).

[16] Maine intervened in the district court pursuant to 28 U.S.C. 2403(b), which provides that:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

cause the Acting Solicitor General determined that other cases were entitled to priority in selecting the limited number of cases the government would ask this Court to review, the United States chose not to appeal in this case (see *United States* v. *Mendoza*, 464 U.S. 154, 160-161 (1984); *International Union, United Automobile Workers, Local 283* v. *Scofield*, 382 U.S. 205, 214 (1965)). In these unusual circumstances, there is a question as to Maine's standing to appeal.

1. It is, of course, not unknown for a party that has intervened in the lower court to be the sole party seeking appellate review. *E.g.*, *Bryant* v. *Yellen*, 447 U.S. 352, 365-368 (1980); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187, 193-194 (1972); *International Union, United Automobile Workers, Local 283* v. *Scofield*, 382 U.S. at 214; *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 280, 281-283 (1936); *International Union of Mine Workers, Locals Nos. 15, 17, 107, 108, & 111* v. *Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 (1945); cf. *United States* v. *California Cooperative Canneries*, 279 U.S. 553, 559 (1929). Where Maine's statute has been declared unconstitutional, thereby

adversely affecting the state's efforts to protect its environment, it clearly was "sufficiently aggrieved" (*INS* v. *Chadha*, 462 U.S. 919, 930 (1983)) and has a "sufficient stake in the outcome of the controversy to afford [it] standing to appeal" (*Bryant* v. *Yellen*, 447 U.S. at 368).

Any other result would make Section 2403(b) a trap for the unwary. A state whose statute is subject to constitutional challenge in federal court and which has accepted the statutory invitation to participate, subject to applicable law, with "all the rights of a party" (28 U.S.C. 2403(b)), could find that the entry of an adverse judgment leaves it without any opportunity for further review. Yet, the state would face the collateral consequences of a judgment in a case in which it had participated as a party. Thus, even though the case did not involve a state prosecution, "when confronted with such an opinion by a federal court, state officials would no doubt hesitate long before disregarding it." *Gunn* v. *University Committee to End the War in Viet Nam*, 399 U.S. 383, 390 (1970).

Faced with that potential trap, states might deem it prudent to decline the invitation to intervene under Section 2403(b) and to wait for an occasion to defend the same statute in later litigation, in which it would be assured of an opportunity to seek appellate review. Federal court challenges to the constitutionality of state legislation would then proceed in cases like the present one, but without the chief benefit Section 2403(b) was intended to provide: the participation of the party best able to explain and defend the state statute.

We are not unmindful that the United States could find itself in a situation analogous to Maine's posture in this case. Section 2403(a) affords to the United

States a similar opportunity to enter private litigation in which the constitutionality of a federal statute is drawn in question. We do not believe that Section 2403(a) permits an interpretation that could produce the unseemly circumstance of a lower court holding that a federal statute is unconstitutional while the government is left powerless to obtain appellate review. See, *e.g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982) (plurality opinion). Nor does Subsection (b) abide a construction that would place a state in the same hapless straits.

2. The fact that this is a federal criminal prosecution adds one further complication. If a reversal of the decision below would necessitate further action on remand, such as retrial, Maine obviously could not take over the role of the prosecution and proceed on the remand in the absence of the United States. The basis for the state's appeal might therefore be undermined if the United States had determined to discontinue the prosecution. In the present case, however, appellee Taylor entered a guilty plea conditioned only on the reservation of his challenge to the constitutionality of the Maine statute. Accordingly, reversal of the decision below would result in automatic reinstatement of the indictment and Taylor's conviction.[17] As

[17] There is, of course, an exception to the rule that a government-intervenor should always be entitled to appeal from a judgment holding one of its statutes unconstitutional—if the parties have entirely "composed their difference" and the case is settled. *Ruotolo* v. *Ruotolo*, 572 F.2d 336, 339 (1st Cir. 1978). This arguably could arise here if the United States were to announce that it would affirmatively seek to dismiss the indictment even in the event that Maine prevails in this Court. The United States, however, disavows any such intention. Even if the case were to become moot, moreover, the

in *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 302-305 (1983) (presence of injured employee as a party respondent in this Court ensures necessary adversity for Article III purposes, even if Director's standing to petition for a writ of certiorari is in doubt), the presence of the United States, even in the capacity of an appellee supporting the appellant, satisfies the requirement that there be a live controversy before this Court concerning reinstatement of the conviction.

Moreover, the role of the United States here serves to distinguish this case from those in which the prosecuting party has absented itself from further proceedings but an intervenor seeks nonetheless to pursue an appeal. In *Princeton University* v. *Schmid*, 455 U.S. 100 (1982), the State of New Jersey declined to take a position before this Court on the merits of a university regulation held unconstitutional in the course of a state criminal proceeding. The Court concluded that New Jersey's "presence," without a position on the merits, "does not provide a sound jurisdictional basis." 455 U.S. at 102. Here, the United States has not only supported Maine's jurisdictional statement, but its position on the merits as well. Two additional factors distinguish this case from *Princeton University* v. *Schmid*. First, in that case the controversy was moot because the regulation at issue was no longer in force; the university could implement its new regulations unimpeded by the judgment. Maine, however, has not amended its environmental prohibition, so the statute's validity is very much a live issue.

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proper procedure would be for this Court to vacate the judgment below (*United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)), which would effectively remove from the state the burden of an adverse judgment.

And finally, since the appellant is a sovereign state seeking to defend its statute, this case does not implicate the principle that a private party 'lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973); see 455 U.S. at 103.

II. THE STATE OF MAINE HAS DEMONSTRATED THE LEGITIMATE LOCAL PURPOSE OF THE STATUTE AND THE LACK OF LESS DISCRIMINATORY ALTERNATIVES, AND THEREFORE THE STATUTE IS VALID UNDER THE COMMERCE CLAUSE

A. The Court Of Appeals Disregarded The Appropriate Standard Of Review By Reevaluating Maine's Substantial Scientific Evidence

Maine's experts presented ample scientific evidence in the trial court supporting the statutory ban on importing live bait fish. In reversing the judgment, the court of appeals exceeded the proper scope of appellate review and erroneously chose to retry the last two factors of the test described in *Hughes* v. *Oklahoma*, *i.e.*, legislative intent and the availability of less discriminatory alternatives. In *Container Corp.* v. *Franchise Tax Bd.*, 463 U.S. 159, 176 (1983) (quoting *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 538 (1951) (emphasis added)), the Court stated:

> [I]n constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, *but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence.*

Similarly, here, the court of appeals should have upheld the findings of the district court regarding the lack of less discriminatory alternatives, because substantial evidence was presented at the trial level to demonstrate that the Maine statute satisfies the *Hughes* test. In essence, the court of appeals reevaluated the credibility of the three prosecution experts and the specific evidence and reached its own "scientific" conclusions that are neither supported by the evidence nor adequately explained in the court's opinion.[18] Only by disregarding the standard of review as to findings of fact supported by substantial evidence did the court of appeals reach the conclusion that Maine's statute is unconstitutional.

In its memorandum and order denying rehearing, the court of appeals stated that the question whether Maine's statute meets the *Hughes* requirement of no less discriminatory alternative, is a mixed question of law and fact (J.S. App. B2). This, however, does not mean that an appellate court owes no deference to the trial court's findings with respect to the factual components of that mixed question. The court of appeals nevertheless concluded that it "was free to examine carefully the factual record and to draw its own conclusions" (*ibid.*). In support of this proposition, the court cited two cases, *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984) (rejecting Hawaii's argument that okolehao and pineapple wine do not compete with other products sold by liquor wholesalers), and *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977) (rejecting state court's holding that transfer tax on securities transactions was not discriminatory). Those cases, however, do not govern here. In neither case did this Court fail to accept findings of underlying fact that were supported by the evidence. The court of appeals' holding here, however, was squarely premised on a reevaluation of the scientific evidence produced at trial concerning the lack of less discriminatory alternatives. Only by discrediting this scientific evidence was the court of appeals able to conclude that less discriminatory alternatives exist.

In order to support that conclusion, the court reasoned that, because Maine has established inspection and certification procedures for freshwater fish (trout and salmon or eggs), the same procedures could be adopted for live bait fish (J.S. App. A8-A9). However, Maine's expert demonstrated that, unlike freshwater fish, out-of-state bait fish are not grown in small, controlled environments (J.S. App. E9) susceptible to a system of out-of-state certification. Thus, disease-free certification for live bait fish is an unworkable alternative.

Similarly, the court of appeals erred in supposing (J.S. App. A9) that inspection procedures offer a feasible alternative. The evidence showed that there are no scientifically accepted inspection procedures for live bait fish.[19] According to the expert testimony, "at

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[18] What is more, the court of appeals manifestly overstepped its role in giving any credence (J.S. App. A9-A10) to the suggestion by respondent's counsel at oral argument that Maine could feasibly, and with less burden on commerce, send its inspectors to hatcheries in other states and require the exporter to pay the cost.

[19] Other state statutes are also restrictive in their regulation of live bait fish. For example, Washington prohibits the use of live fish for bait, thus removing the incentive for importing them. Wash. Admin. Code R. 232-12-144 (1981). Minnesota issues permits only for the *transportation* of minnows (bait fish) "into or through" the State for a period of 12 hours. Minn. Stat. Ann. § 101.42, subd. 6 (West 1977). Similarly,

the present time we do not have any established procedures for the inspection of these particular diseases of particular concern." Tr. 31. The court of appeals therefore had no license to substitute instead its own assumption that "Maine has [not] searched for and found the least discriminatory alternative." (J.S. App. A10).[20] The court's doubts cannot displace the concrete evidence and findings of fact compiled in the district court.

This Court's recent decision in *Anderson* v. *Bessemer City*, No. 83-1623 (Mar. 19, 1985), rendered after the court of appeals' decision in this case, reaffirms the importance of proper adherence by reviewing courts to the "clearly erroneous" standard. In reiterating this standard in *Anderson*, the Court stated, slip op. 8:[21]

> "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it would have decided the case differently.

With particular reference to the findings of a district court sitting without a jury, the Court noted that appellate courts must remember that " 'their function is not to decide factual issues *de novo*' " (*ibid.*, quoting *Zenith Radio Corp* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969)). As the Court observed,

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other states grant authority to either a game commission or a commissioner to prohibit the importation of certain birds, animals and fish; see Nev. Rev. Stat. 503.310 (1983); Ala. Code § 9-2-13 (1980); Mich. Stat. Ann. § 13-1586(5a) (Callaghan 1981); N.C. Gen. Stat. § 113.160 (1983).

[20] In *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, No. 82-1005 (June 25, 1984), the Court deferred to the Administrator of the Environmental Protection Agency's decision to use a plantwide definition for programs designed to improve air quality pursuant to the Clean Air Act. The Court reasoned that the EPA Administrator's "interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference. The regulatory scheme is technical and complex * * *." Slip op. 26. Similarly, in this case the appellate court should have deferred to the state legislature's conclusion that less discriminatory alternatives are not available in view of the scientific evidence presented at trial by the State's witnesses and the district court's findings.

[21] While the present case, unlike *Anderson*, is a criminal case, "there is general agreement that the 'clearly erroneous' test should be applied [to issues other than guilt] and that it has the same meaning in criminal cases as it has in civil cases." 2 C. Wright, *Federal Practice and Procedure* § 374, at 316 (1982) (footnote omitted).

An appellate court's power to review the whole record and make an independent judgment in constitutional cases is, of course, wholly consistent with the proper scope of the clearly erroneous standard of Rule 52, Fed. R. Civ. P. As the Court stated in *Bose Corp.* v. *Consumer Union of United States, Inc.*, No. 82-1246 (Apr. 30, 1984), slip op. 13, "Rule 52(a) never forbids [an independent] examination, and indeed our seminal decision on the rule expressly contemplated a review of the entire record, stating that 'a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite, and firm conviction that a mistake has been committed' " (quoting *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis in original)). The Court has recently applied the clearly erroneous standard in a case in which the constitutionality of municipal ordinances was in question. See *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, No. 83-1925 (June 3, 1985), slip op. 13.

among the reasons for deferring to the trial court's findings of fact are: (1) the trial judge's experience in making determinations of fact and in evaluating the credibility of witnesses; and (2) the fact that the parties have already expended their energy and resources in "persuading the trial judge that their account of facts is the correct one." *Anderson*, slip op. 9.

"[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief of what is said." *Anderson*, slip op. 10. In the present case, most of the evidence offered to the trial judge was submitted by experts (three for the prosecution and one for the defense). In such circumstances, deference to the trial court's findings is particularly appropriate. As this Court explained in *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 274 (1949), aff'd on reh'g, 339 U.S. 605 (1950):

> To no type case is * * * [the clearly erroneous standard] more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific [evidence].

Finally, it bears mention that the sole defense expert's testimony was discredited on the basis of his lack of familiarity with Maine's wild fish population or cold-water fish.[22] In sum, there was no credible expert factual foundation for the court of appeals' revision of the evidence. Had it correctly deferred to the trial court's findings of fact, it could not have concluded that Maine's statute was unconstitutional for failure to incorporate a less intrusive alternative.

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[22] See pages 4-5, *supra*.

B. The Court Of Appeals Did Not Sufficiently Consider The Serious Consequences To Maine's Ecology Of Invalidating The Challenged Statute

It is of course well established that "the commerce clause is not a guaranty of the right to import into a state whatever one may please * * * regardless of the effects of the importation upon the local community." *Robertson* v. *California*, 328 U.S. 440, 458 (1946). See *Hughes* v. *Oklahoma*, 441 U.S. at 338-339 (states are not powerless to promote the legitimate purpose of "protect[ing] and conserv[ing] wild animal life within their borders").

This Court's Commerce Clause cases emphasize the importance of considering the "ultimate consequences" to a state if it is not allowed to regulate the activity or commerce in the "questioned" manner. In contrast, the court of appeals utterly failed to consider the significant risk and ultimate consequences to Maine, demonstrated in the record, if it is not allowed to regulate the importation of live bait fish in the "questioned" manner. As this Court noted in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976) (citation omitted), if a state demonstrates a substantial interest (as Maine has—the protection of its environment and ecology), a further inquiry is necessary to determine whether:

> adequate and less burdensome alternatives exist * * * since any "'realistic' judgment" whether a given state action "unreasonably" trespasses upon national interests must, of course, consider the "consequences to the state if its own action were disallowed." [23]

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[23] In observing that this additional inquiry is needed, the Court in *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. at 372 n.6, also quoted the following passage from Justice

As a consequence of its rejection of the scientific evidence presented by Maine's experts, the court failed to give adequate consideration to the significant risk to Maine's ecology if its statute cannot be enforced. Maine provided compelling evidence demonstrating the statute's legitimate purpose as the elimination of that risk, *i.e.*, diseased fish and exotic fish that could seriously harm Maine's aquatic environment. Moreover, the court of appeals imposed an overly stringent burden of proof on the State of Maine, not warranted by the *Hughes* test, by requiring the State to negate all impermissibly discriminatory economic purposes and conceivable nondiscriminatory alternatives.[24] After all, *Hughes* does not require automatic invalidation of a statute because some less restrictive alternative may be divined subsequently. Rather, *Hughes* is concerned with the practical availability of options and speaks of an alternative that is " 'adequate to

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Stone's dissent in *Di Santo* v. *Pennsylvania*, 273 U.S. 34, 44 (1927):

> [I]t seems clear that those interferences [with interstate commerce] not deemed forbidden are to be sustained * * * because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effects on the flow of commerce, leads to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across the lines.

[24] *Hughes* involved an Oklahoma statute prohibiting the export of three dozen minnows. It is significant that in *Hughes*, Oklahoma presented the statute's purported legitimate purpose (an effort to maintain the State's ecological balance) for the first time in this Court. As this Court noted, "[t]he late appearance of this argument and the total absence of any record support for the questionable factual assumptions that underlie it give the flavor of a *post hoc* rationalization." 441 U.S. at 338 n.20 (emphasis in original). By contrast, the

preserve the local interests at stake' " (441 U.S. at 336, quoting *Hunt* v. *Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977)). Only alternatives that promote the local purpose equally "as well" as the challenged statute are relevant. 441 U.S. at 336. See *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Nor should Maine have been required to prove again in the court of appeals the facts that led both the state legislature and the district court properly to determine that Maine's ecology could not be protected effectively by any means short of a total ban on importing live bait fish.[25] Accordingly, the court of appeals erred in holding that the Constitution requires the State to bear the inordinate risk that could result from the importation of live bait fish when the overwhelming scientific evidence demonstrated the reasons for the State's fears.[26]

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trial record here provides ample evidence to support Maine's justification for its statute.

[25] The absence of an accepted testing procedure for live bait fish makes this case unusual. Ordinarily, one would expect that tests could be used to bar only diseased animals from entry (*e.g. Asbell* v. *Kansas*, 209 U.S. 251 (1908); *Reid* v. *Colorado*, 187 U.S. 137 (1902)). But that assumption is misplaced here. As the experts testified, the only way to detect the presence of threatening parasites in bait fish is to kill the specimen. That, of course, would destroy the fish's value as "live" bait. Moreover, since Maine does not ban dead bait fish, the test would render the statutory restriction redundant.

[26] Although we support Maine's principal argument, we do not agree with its alternative submission (J.S. 12-13) that the invalidation of Maine's statute "flies directly in the face of [the] * * * Lacey Act Amendments of 1981" (*id.* at 12). Rather, we agree with the court of appeals (J.S. App. A13) that the Lacey Act Amendments, although evincing congressional intent to strengthen the enforcement of valid state laws en-

We note, finally, that this case is a good example of why greater deference is sometimes appropriate for a statute, such as this one, that bans imports for health and environmental reasons, than would be appropriate for a similar statute that bans exports.[27] In prohibiting the importation of live bait fish, Maine is seeking to ensure the protection of its fisheries from parasitic-infested or exotic predatory fish. The experts testified that the inadvertent importation of even two such specimens in a shipment of live bait fish could multiply to hundreds and adversely affect Maine's ecology (Tr. 36; J.S. App. E9 n.7). As this Court stated in *Philadelphia* v. *New Jersey*, 437 U.S. 617, 628-629 (1978) (citation omitted):

> certain quarantine laws have not been considered forbidden protectionist measures, even though they were directed against out-of-state commerce. But those quarantine laws banned the

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acted for the protection of wildlife, cannot be interpreted as "clear congressional intent to uphold all state laws that discriminate against interstate commerce in fish and wildlife." See, *e.g.*, *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 7-10. Maine's contrary argument is at odds with prior decisions of this Court. See, *e.g.*, *South-Central*; *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

[27] Taylor is an in-state seller of live bait fish. Thus, the effect of the statutory ban is not limited to out-of-state persons. As this Court noted in a case where the challenge to a state statute came primarily from domestic firms, "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981), citing *South Carolina State Highway Dep't* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 178 (1938).

> importation of articles such as diseased livestock that required destruction as soon as possible because their very movement risked contagion and other evils.

So, here, the absence of scientifically accepted testing procedures to minimize a substantial risk of infestation puts this case within the narrow category where a total ban on importation passes constitutional muster. On the present record Maine has established that out-of-state live bait fish "are more likely to possess the evils of [parasitic infestation] * * * than their homegrown counterparts" and that "outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 43 (1980).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPELLEE'S

BRIEF

No. 85-62

In The
Supreme Court of the United States
October Term, 1985

—o—

STATE OF MAINE, APPELLANT

v.

ROBERT J. TAYLOR AND UNITED STATES OF AMERICA

—o—

On Appeal From The United States Court of Appeals For The First Circuit

—o—

BRIEF FOR ROBERT J. TAYLOR, APPELLEE

—o—

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QUESTIONS PRESENTED

(1) May the State of Maine, as a party for the limited purpose of presenting facts and law to protect its statute, properly invoke the provisions of Title 28 U.S.C. § 1254(2) to confer appellate jurisdiction to review the constitutional question presented?

(2) May the State of Maine, consistent with the Commerce Clause, ban all importation of live baitfish?

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, provides, in pertinent part:

> The Congress shall have Power . . . to regulate Commerce with foreign Nations, and among the several States, . . .

The Lacey Act Amendments of 1981, 16 U.S.C. § 3371 et seq., provide in pertinent part:

> It is unlawful for any person—
>
> * * * * *
>
> (2) to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce—
>
> (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State . . . 16 U.S.C. § 3372(a).

Title 12, Maine Revised Statutes Annotated, Section 7613 provides:

> A person is guilty of importing live bait if he imports into this State any live fish, including smelts, which are commonly used for bait fishing in inland waters.

28 U.S.C. § 1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude re-

view by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Act of February 13, 1925, C. 229, § 1, 43 Stat. 938.

"Sec. 239. In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal."

Sec. 240. (a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

"(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any

State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error, or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

"(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Act of March 3, 1911, C. 231, §§ 239, 240, 241, 36 Stat. 1157.

Sec. 239. In any case within its appellate jurisdiction, as defined in section one hundred and twenty-eight, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision; and thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit court of appeals in such case, or it may require that the whole record and cause be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

Sec. 240. In any case, civil or criminal, in which the judgment or decree of the circuit court of appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination,

with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

Sec. 241. In any case in which the judgment or decree of the circuit court of appeals is not made final by the provisions of this Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs.

Act of March 3, 1891, C. 517, § 6, 26 Stat. 828

Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

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STATEMENT OF THE CASE

1. Robert J. Taylor is a businessman who lives and conducts business in Argyle, Maine. Mr. Taylor, among other ventures, raises and sells golden shiners for use as live bait as is permitted by Maine law. 12 M.R.S.A. § 7171. Because of the high demand for live bait in Maine, Mr. Taylor is unable to fill his customers' orders if he has to rely solely on his own crop of golden shiners. He needs to be allowed to import golden shiners in order to compete effectively in the market place. On December 26, 1981, an unindicted co-conspirator was arrested in the process of importing 158,000 golden shiners for Mr. Taylor. The State of Maine bans all importation of baitfish. 12 M.R.S.A. § 7613

On February 24, 1983 a Grand Jury sitting in the United States District Court for the District of Maine returned an indictment against Robert J. Taylor, alleging in two counts a conspiracy to violate the Lacey Act. Pub. L. No. 97-79, 95 Stat. 1073 (1981), 16 U.S.C. § 3371, et seq., and violation of the Lacey Act. (Appendix, hereafter A. 8-12) The indictment alleged that Robert Taylor imported live baitfish (golden shiners) into the State of Maine in violation of a prohibition against all importation of baitfish into the State contained in Title 12 M.R.S.A. § 7613, which was presumably enforceable through the provisions of the Lacey Act. Robert Taylor filed a Motion to Dismiss the indictment on the grounds of the unconstitutionality of Title 12 M.R.S.A. § 7613 as an impermissible state regulation of interstate commerce. (A. 13) The Attorney General of the State of Maine was notified of the Constitutional attack on the statute and he moved to intervene pursuant to Title 28 U.S.C. § 2403(b) for the limited purpose of defending the constitutionality of the statute. (A. 15) The motion was granted without objection. (A. 17)

A hearing on the Motion to Dismiss was held before the United States Magistrate. The State of Maine participated pursuant to its role as an intervenor for the purpose of presenting facts and law as to the constitutionality of its statute. At the hearing the State conceded that the statute was facially discriminatory, leaving it with the burden of proving that the statute served a legitimate local purpose and that no less discriminatory alternative would serve that legitimate local purpose. The Magistrate, purporting to strictly scrutinize the evidence, issued a recommended decision denying the Motion to Dismiss. (Jurisdictional Statement, Appendix E; hereafter, J.S. App.)

Robert Taylor filed his objection to the Magistrate's recommended decision. (A. 5) The District Court upheld the Magistrate's recommended ruling and denied the Motion to Dismiss. (J.S. App. D) *United States v. Taylor*, 585 F.Supp. 393 (D. Me. 1984) Following this court action, Robert Taylor entered a conditional plea of guilty, reserving his right to appeal the denial of his Motion to Dismiss. (A. 6) Judgment was entered for the Government and Robert Taylor appealed. (A. 7).

The Court of Appeals for the First Circuit reversed the decision of the District Court. (J.S. App. A) *United States v. Taylor*, 752 F.2d 757 (1st Cir. 1985) The Court of Appeals questioned the legitimacy of the local purpose offered to justify the ban but did not decide the issue. (J.S. App. A-8) The Court of Appeals also felt that the indications of economic protectionism were strong, but again did not so hold. It did hold that there were less restrictive means to achieve the local purpose and therefore struck down the statute. (J.S. App. A-8-10) Following the denial of a Petition for Rehearing and Hearing *en banc*, the United States and the State of Maine both appealed. The United States later moved to withdraw its appeal and this motion was granted. (A. 311-315).

2. The State of Maine asserts that the total ban on the importation of baitfish is necessary because the ban serves two basic prophylactic functions: to control the spread of disease and to prevent the introduction of exotic species into the state. (A. 37-38) At the hearing on defendant's Motion to Dismiss, in support of its initial contention that imported bait may cause contagion, the State presented expert testimony as to three types of parasites which may be found in commercially raised baitfish and

which, prior to 1983, had not been found in Maine wild fish populations. First, *capillaria catastomi,* a type of roundworm which may cause intestinal disorders in golden shiners (A. 40), were not prevalent in wild fish in Maine prior to 1983, but since then have been found in many areas of the State. (A. 44) They were discovered in "low to moderate numbers" in the fish which were seized in the case at bar. (A. 45).

Second, the State's expert identified the parasite *pleistophora orariae* which attacks the ovaries of female golden shiners and reduces their fertility. (A. 45) *Pleistophora* has never been found in wild fish in Maine (A. 49) but it was present in the defendant's seized stock. (A. 49).

Last, the State's witness noted the existence in out-of-state baitfish of the *bothriocephalus opsariichthydis,* or Asian tapeworm, which enters a fish's intestines and ultimately may cause fatal damage. However, no Asian tapeworms have been found in Maine wild fish and none were present in the bait imported by defendant. (A. 50-53).

The State's experts asserted that short of a total ban, there is no way to guarantee that imported baitfish are disease free. Since there are no procedures adopted by the fisheries industry for inspecting baitfish for the above-noted parasites, the State's witnesses claimed that a certification requirement rather than a complete embargo on imported bait would be ineffective to control the spread of disease. (A. 71-82).

In support of the statute's second purpose, to exclude exotic species, the State's witnesses testified that any non-native species of wildlife, be it fish, insect, reptile or amphibian, which might be brought in along with imported

baitfish is a possible threat to Maine's environment. One witness testified that in the past seven years, three new baitfish species have been discovered here. (A. 67-70) Nonetheless, that witness conceded, the effects of these species, plus stray polliwogs and crawfish which have turned up in illegal shipments, are unknown. (A. 70).

On cross-examination, State witnesses acknowledged that Maine law permits importation of other freshwater fish, including exotics such as goldfish, and that these species pose threats to the environment similar to that of the golden shiner. (A. 24, 156-168) Further, the State's experts conceded that any fish inspection method, including those accepted by the industry and government agencies, involve taking samples and are not absolute control measures. (A. 194-196).

The State's expert conceded in cross-examination that Maine shared a common border with New Hampshire. (A. 103) New Hampshire does not ban importation of baitfish from other states, but only regulates that importation. (A. 102) Several rivers flow from New Hampshire into Maine and the two states share a common drainage. This common drainage makes it impossible to keep from the State of Maine whatever fish species or parasites that exist in New Hampshire. (A. 103, 104).

In addition to the wildlife conservation purposes of the Maine law, one witness, speaking on behalf of the Maine Department of Inland Fisheries and Wildlife, suggested that the statute is also an economic protection measure. In a printed statement, that witness asked rhetorically: Why should we "spend our money in Arkansas when it is far better spent at home? [He answered.] It is very clear that much more can be done here in Maine to

provide our sportsmen with safe home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states." (A. 294).

In defense, an expert in baitfish pathology testified that the parasites identified by the State are not even considered "reportable" diseases by the U.S. Fish and Wildlife Service. (A. 207) A "reportable" disease is one whose spread would have a serious detrimental impact on the fishery industry. The list of such diseases is determined by committees of fish health specialists. (A. 207) Because the State's cited parasites are not "reportable," no standard sampling procedures for inspection have been adopted by professionals in the field. (A. 267) Nonetheless, a sampling technique could be developed for baitfish just as they have been for other species. (A. 267).

The defendant's pathologist, who was the first in his profession to identify the *pleistophora ovariae,* noted that the parasite is "strictly a hatchery problem". (A. 208-209) It has not been found to have an impact on wild populations. (A. 210) The only detrimental effect of the *pleistophora* is to require commercial raisers to use more brood stock than otherwise would be necessary. (A. 209).

As for *capillaria catastomi,* it has no negative impact on golden shiners as long as they are fed properly. The only time the parasite may become a problem is when a fish suffers from malnutrition. (A. 229) It is the latter which may stunt the fish's growth, not the roundworm. (A. 259) Again, the *capillaria* problem is significant only in hatcheries where fish are more susceptible to disease than are wild fish due to greater population densities.

Last, *bothriocephalus opsariichthydis,* the defense expert noted, after a fish population has been exposed to it, poses no fatal impact on the fish. (A. 232) Further, the tapeworm, far from being prevalent in all golden shiner hatcheries, is found only in those where grass carp are also used for weed control. (A. 232) Even the presence of grass carp does not mean that the tapeworm will necessarily pose a threat: in Iowa, for example, grass carp are used extensively and there is no Asian tapeworm problem. (A. 233).

Regarding the threat posed by the entry into Maine of exotic species along with imported baitfish, the defense pathologist noted that for the most part, commercial golden shiner farmers are "very professional" and take great care to insure that no other species of fish or wildlife intrude in a pond where they are raising the minnows. (A. 238-240) In fact, the methods used in golden shiner culture are "very analogous" to those used in raising Salmonids (A. 240), a freshwater fish which is freely imported into Maine. (A. 159) Thus imported baitfish pose no more of an "exotics" problem than do other types of freshwater fish which legally enter the State.

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SUMMARY OF ARGUMENT

1. The case before this Court arose as a criminal matter entitled *United States v. Robert J. Taylor.* The United States Attorney had the sole power to prosecute the case. 28 U.S.C. 547(1) When Mr. Taylor moved to dismiss the indictment by attacking the constitutionality of a Maine statute, the Attorney General of the State of

Maine moved to intervene to protect the statute. The indictment was ordered dismissed by the Court of Appeals. The United States Attorney decided not to appeal. No live case or controversy now exists before the Court. *Ashcroft v. Mattis*, 431 U.S. 171 (1977). The appeal should be dismissed.

The appeal was improperly taken pursuant to the provisions of 28 U.S.C. 1254(2). When reading the entire statute it is clear that subsection (2) was meant to apply only to civil cases. This reading of the statute is also supported by the statutory history. The appeal should be treated as a Petition for Writ of Certiorari. 28 U.S.C. § 2103. The Petition should be dismissed for lack of an important national question.

2. The Court of Appeals correctly decided the case on the merits. The Court of Appeals was not constrained by the clearly erroneous standard of review because the District Court failed to properly apply a strict scrutiny standard to a commerce clause challenge to a state statute. *Bose Corp. v. Consumers Union of United States, Inc.*, — U.S. —, 104 S.Ct. 1949 (1984). When the State of Maine chooses to halt the flow of interstate commerce at its borders, the State must advance a most compelling local purpose for that ban to avoid an almost per se rule of invalidity because of its effect as economic protectionism. *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). When the facts presented in this case are strictly scrutinized, there is no compelling local purpose which outweighs the national interest in the free flow of commerce throughout the United States. The decision of the Court of Appeals should be affirmed.

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ARGUMENT

I. THE STATE OF MAINE, AS A PARTY FOR THE LIMITED PURPOSE OF PRESENTING FACTS AND LAW TO PROTECT ITS STATUTE, MAY NOT PROPERLY INVOKE THE PROVISIONS OF TITLE 28 U.S.C. § 1254(2) TO CONFER JURISDICTION UPON THIS COURT.

There are two reasons why this Court is without appellate jurisdiction. First, the statute by which the State seeks to invoke this Court's appellate jurisdiction does not apply to this case. Second, there is no appellant within the meaning of Article III of the Constitution and therefore there is no case or controversy sufficient to allow this Court to act. Mr. Taylor addresses those points in turn.

A. 28 U.S.C. §1254 Does Not Apply To This Case.

Both the State and government have argued that the "plain meaning" of 28 U.S.C. § 1254(2) requires that the State's appeal be heard. Both have ignored the equally important canon of construction that one must read the entire statute at issue and not merely one subsection. When one reviews the entire text of section 1254, the most rational conclusion of Congressional intent is that subsection (2) does not apply to criminal appeals. While both subsections (1) and (3) speak of review in "any civil or criminal case", this expansive language is curiously absent from subsection (2). If Congress had intended for all three subsections to apply to both civil and criminal cases, the language would have been either included in all three subsections or omitted from all three subsections. The absence of the language

from only subsection (2) leads to the inescapable conclusion that it was not meant to apply to criminal cases.[1]

The historical development of Section 1254 sheds further light on Congressional intent. In 1891 Congress established the framework for review of cases from a court of appeals and stated that review in criminal cases by appeal was final in a Court of Appeals. Act of March 3, 1891, c. 517, § 6, 26 Stat. 828. Criminal cases could be reviewed by the Supreme Court on certification by a Court of Appeals, or by certiorari or otherwise to a Court of Appeals. In civil cases where the matter in controversy exceeded one thousand dollars there was a right to an appeal. *Id.*

Congress modified the framework for review of cases decided in a Court of Appeals in 1911. Act of March 3, 1911, c. 231 §§ 239, 240, 241, 36 Stat. 1157. Any case, civil or criminal, could be reviewed by certiorari, or by certification, but again the right of appeal in civil cases was limited to matters in which the controversy exceeded one thousand dollars. In 1925, Congress restricted the direct appeal right to "any case" in which the validity of a state statute was questioned on the grounds of the Constitution, treaties or laws of the United States. Act of February 13, 1925, c. 229, § 1, 43 Stat. 938. Again, review by certification of a question, or by writ of certiorari, was specifically allowed in "any case, civil or criminal". The structure of the 1925 Act has been carried forward to 28 U.S.C. 1254, leaving little doubt that subsection (2) should apply only in civil cases. Jurisdiction to review the decision of the Court of Appeals in this case is by certiorari alone.[2]

[1]The Criminal Appeals Act, 18 U.S.C. 3731, limits governmental appeals from District Court to the Court of Appeals. Further review by this Court must be by Writ of Certiorari. R. Stern and E. Gressman, Supreme Court Practice, § 2.11, at 81 (5th ed. 1978).

B. The State of Maine Is Not a Party to a Federal Criminal Prosecution Sufficient to Invoke the Appellate Jurisdiction of this Court.

The State of Maine petitioned the United States District Court to be allowed to intervene "for the purpose of defending, by the presentation of evidence and/or argument, the constitutionality of 12 M.R.S.A. § 7316 . . . ." (A. 15) The State made that motion pursuant to 28 U.S.C. § 2403(b) which allows a state to intervene for the purpose set forth above. Section 2403(b) does not allow the State to intervene for all purposes.

The State's motion was granted. The granting of that motion did not have the effect of granting the State any prosecutorial powers. The United States Attorney, representing the United States, retained the sole power to prosecute the case. 28 U.S.C. § 547(1). This limitation of the power of the state is fatal to this Court's jurisdiction over this case.[3]

[2]If the Court rejects the argument set forth in Part B, then Mr. Taylor concedes that this Court may treat the appeal as a petition for writ of certiorari. 28 U.S.C. § 2103. As discussed in Mr. Taylor's Motion to Dismiss or Affirm, the question is not of sufficient national concern to merit a writ of certiorari. The United States agrees. Jurisdictional Brief of the United States at 6.

[3]Since only the State of Maine and Robert Taylor remain in the case, a reversal of the order of the Court of Appeals would leave no party before the District Court with the power to initiate the "formalities" necessary to reinstate the indictment. There can be no case or controversy at any level in the present procedural posture.

The Government contends that it is not unknown for an intervenor to seek appellate review. Brief of the United States, at 15. None of the cases cited by the government involved intervention by a State under the provisions of 28 U.S.C. § 2403(b), nor were any of them criminal cases. These two distinctions mean that any reliance upon the cited cases would be misplaced. This case must be analyzed by reference to the statutory language of § 2403 (b) within the context of a criminal case.

The only party with the power to prosecute a criminal case in the Federal Courts is the United States represented by its attorneys. 28 U.S.C. § 547(1) The State of Maine was permitted to intervene in this criminal case for the limited purpose of protecting its statute from Constitutional attack. This limited grant of power does not permit the State of Maine to appeal the decision of the Court of Appeals as it relates to the disposition of the criminal charge against Mr. Taylor. The disposition of the criminal charge was settled when the United States decided to withdraw its appeal. Once the criminal case was disposed of, no case or controversy remained alive to come before this Court on appeal. *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

The State of Maine will complain that this leaves it without full benefit of the judicial process to protect its statute. The answer to this complaint lies in the fact that it was the state's statute which established the prohibited act underlying the indictment. If the State wanted full control of the course of litigation it should have brought the indictment in state court. When it surrendered control of the prosecution to the United States, it implicily

agreed to accept the prosecutorial decisions of the United States. The United States decided to lay the matter to rest, and the State of Maine must abide by that decision. The appeal should be dismissed.

II. THE STATE OF MAINE'S PROHIBITION AGAINST THE IMPORTATION OF BAITFISH VIOLATES THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Statutory Ban Must Be Analyzed According to Principles of Strict Scrutiny.

The Commerce Clause, Art. I, Sec. 8, Clause 3 of the United States Constitution, authorizes Congress "to regulate commerce . . . among the several states." It is a broad grant of federal power, designed by the framers of the Constitution to curb the relative anarchy which prevailed under the Articles of Confederation by establishing a uniform policy of trade and permitting the free flow of goods throughout the country. See, M. Farrand, THE FRAMING OF THE CONSTITUTION 45 (1913, 1962); Hamilton's No. 22 of THE FEDERALIST. The unimpeded movement of commercial traffic has been cited frequently as one of the primary bases for this country's material eminence. Our economic system depends upon the free flow of commerce among the states. The founding fathers envisioned a national economic entity and this Court has given life to that vision. *H. P. Hood and Sons v. Dumond*, 336 U.S. 525 (1949).

When first confronted with the issue, this Court reviewed the Commerce Clause as an exclusive grant of power to Congress, excluding the states from interstate

commercial regulation. *Gibbons v. Ogden,* 22 U.S. 1 (1824). This exclusion of state regulation was consistent with the importance of the emerging national economy.

In more recent times states have not been excluded entirely from the power to regulate interstate commerce. "States may regulate interstate commerce evenhandedly to effectuate a local public interest, and . . . (the) effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it would be promoted as well with a lesser impact on interstate activities." *Hughes v. Oklahoma,* 441 U.S. 322, 331 (1979) citing *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970).

The limited power to regulate in the area of interstate commerce in no way diminishes the importance of the national economy. So important is economic growth and a citizen's ability to participate in the economy that the right to engage in interstate commerce is considered a "privilege" guaranteed to every citizen by the United States Constitution. *Crutcher v. Kentucky,* 141 U.S. 47, 57 (1891). *Sugarman v. Dougall,* 413 U.S. 634, 652 (1973) (Rehnquist dissenting).

Since Maine's ban on the importation of baitfish interferes with Robert Taylor's fundamental right to engage in interstate commerce, this Court should apply the same type of strict scrutiny that is applied to legislation infringing upon other fundamental rights. Although the

tests have not been compared in the cases, Mr. Taylor believes the same strict scrutiny test should be applied when fundamental individual or economic rights are infringed by discriminatory state legislation.

In the beginning of this nation's history, almost all of the crucial legal questions concerned economic and not personal freedom. At that time even the resolution of the debate over the propriety of slavery was resolved by means of an economic analysis. D. Bell, The Supreme Court 1984 Term. Forward: The Civil Rights Chronicles, 99 Harv. L.Rev. 4, 6 (1985). The key to economic freedom and the key to the strength of the country in the Nineteenth Century was the free flow of interstate commerce. The free flow of commerce is still crucial to our country's strength. By the time this Court turned the major focus of its attention to personal freedom, in the period following the approval of New Deal social and economic legislation, rules of commerce clause adjudication were well developed and *Southern Pacific v. Arizona,* 325 U.S. 761 (1945), had established, without using the modern terminology used in equal protection cases, that the strict scrutiny test would be applied to state legislation that discriminated against interstate commerce.

The right to engage in the free flow of interstate commerce is not dissimilar to the right of an individual to travel freely in interstate commerce which this court has deemed to be a fundamental right. *Shapiro v. Thompson,* 394 U.S. 618, 629-630 (1969). That right cannot be the subject of discriminatory state legislation unless the state can show that the legislation is necessary to promote a compelling governmental interest. *Id.* at 634. While the *Shapiro* case speaks in terms of equal protection analysis,

the discrimination is similar, and the same type of scrutiny should apply in this case.

It is now well recognized that equal protection challenges to discriminatory state legislation are subject to an analysis that first requires the court to determine the amount of scrutiny to which the legislation will be subjected. Robert Taylor believes that legislation impinging upon fundamental interests or effecting suspect classes, arising in the context of equal protection analysis, interstate commerce clause analysis, or privileges and immunities analysis, is subject to the highest scrutiny. It is this highest scrutiny, or strict scrutiny, which the District Court did not apply, that Robert Taylor is asking the Court to apply in this case so that his fundamental right to participate in the national economy will be protected.

The strict scrutiny standard of analysis in commerce clause cases involving discriminatory statutes has often been applied by this Court. *Hughes v. Oklahoma,* 441 U.S. 332 (1979); *see also Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Hunt v. Washington Apple Advertising Comm'n.,* 432 U.S. 333 (1977). Once discrimination against interstate commerce is established "at a minimum" the Court must apply "the strictest scrutiny of any purported legitimate local purpose and the absence of nondiscriminatory alternatives." *Supra* at 337.

Under such a standard of analysis, the most compelling of evidence is required to sustain the statute. It is not enough for the Court to find that the legislation is simply one reasonable or plausible means to promote a legitimate state objective. Rather, under the mandated intensive

review, the Court must look beyond enunciated statutory purpose and consider, even speculate, as to the availability of less burdensome alternatives. See, *Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977); *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951). It is because the District Court failed to apply strict scrutiny to the importation ban that the Court of Appeals reversed.

Appellant now addresses the question the District Court should have addressed and the question the Court of Appeals did address: does Maine's importation ban meet strict scrutiny? As will be seen, the answer is no.

B. The State of Maine Did Not Meet Its Burden of Proving Under a Strict Scrutiny Standard That Its Statute Addressed a Legitimate Local Purpose in the Least Discriminatory Available Manner.

Once a statute has been found to discriminate against interstate commerce, a State hoping to protect that statute from attack must prove that it serves a legitimate local purpose and that there are no less discriminatory alternative methods by which the local purpose can be served. *Hughes v. Oklahoma,* 441 U.S. 322 (1979).

In its limited role as an intervenor to protect its statute, the State of Maine presented evidence at a hearing in an attempt to meet its burden of proof. Robert Taylor contends that the State did not meet that burden under a properly applied strict scrutiny standard. Although the Magistrate's Recommended Decision and the District Court Order both uphold the statute, a review of those decisions does not reveal the critical analysis of State evi-

dence which would be required under a strict scrutiny standard. The first critical analysis of the State's evidence was performed by the Court of Appeals which found the evidence lacking the compelling force necessary to uphold a discriminatory statute.

The State of Maine cites two dangers to the environment which it is trying to prevent by prohibiting the importation of baitfish. The first danger cited is that of contagion by parasites. The State's expert specifically spoke about *Capillaria catastomi*, *Pleistophora ovariae*, and *Bothriocephalus opsariichthydis* as presenting a danger to the State's environment. This threat to the environment was vigorously disputed by the defense expert witness. According to his testimony, none of the named parasites present any danger to the wild fish population. At most, the parasites present a controllable problem in the context of hatchery raised fish. In the face of this evidence the District Court merely accepts the testimony of the State's expert without analysis of why that evidence is compelling.[4]

Robert Taylor contends that a critical analysis of the "dangers" posed by the parasites demonstrates that the drastic regulation of prohibition against importation is unwarranted. *Pleistophora ovariae* gradually attacks the ovaries of a female fish, eventually preventing reproduction. It is apparently transmitted from mothers to daughters at birth. While it may be possible to transmit in the wild, that had not happened to the knowledge of the de-

[4]The District Court stated "that the fact that the experts disagree on the seriousness of the parasites and the concommitant danger posed by their introduction into the State, and that it is impossible to predict the long-term adverse consequences of exotic species, is not sufficient to taint the legitimacy of the State's interest in excluding them." (J.S. App. D-6).

fense expert. (A. 210-211) The only problem that the parasite causes is that the female can no longer reproduce after several reproductive cycles. (A. 46) Since transmission of the parasite occurs in reproduction, the problem is obviously self-limiting.

Capillaria catastomi is a worm parasite which may exist in the intestine of a golden shiner and according to the State's expert, may cause an inflammation that slows growth or in a few cases causes death. (A. 46) The defense expert noted that the parasite is not a pathogen and is a problem only in hatchery situations where the fish are malnourished. (A. 218, 219) There is no threat to the fish if properly cared for. It is merely one of many kinds of worm parasites that exist in fish without harm. (A. 229, 115) In addition, the State's expert found *Capillaria catastomi* to be widespread in the State of Maine in 1983. The State of Maine can hardly claim a legitimate local purpose in keeping the parasite out when it is already widespread within the State (A. 44).

The final parasite problem mentioned by the State's expert is *Bothriocephalus opsariichthydis* or Asian tapeworm. This is also a parasite worm that has the potential for blocking the intestines of a fish and killing it. (A. 51) Defendant's expert conceded that there had been some mortality associated with the Asian tapeworm, but only on initial exposure. (A. 230) The only *claimed* presence in wild populations of fish occurred in a largemouth bass in Kansas.[5] (A. 88, 231) The defense ex-

[5]According to the Blue Book, the Asian tapeworm has a host range of golden shiner, fathead minnow, grass carp, and mosquito fish. The Asian tapeworm is host specific to *cyprinidae* and therefore unlikely to have been found in a bass which is cenprarchidae. D. McDaniel, ed. *Procedures For the Detection in Identification of Certain Fish Pathogens*. (1979 revision).

pert stated that there would be no problems serious enough to warrant total exclusion of golden shiners from Maine.

The second area of concern for the State is the introduction of exotic species. The State is concerned that, without control, exotic species with unknown impact on the State's environment will be introduced. Robert Taylor's position is that the State of Maine has expressed this concern in a curious fashion. It does not expressly prohibit the direct importation of exotic species.[6] It would seem that the best way to stop introduction of exotic species would be to expressly prohibit the practice.

Further, some simple regulation of imported fish, including baitfish, would be more effective in stopping the introduction of exotic species. For example, in many hatchery operations golden shiners are raised in a manner similar to trout. (A. 240) From these hatcheries one could guarantee that only golden shiners are included in a shipment.[7] If the State, or its designated representative, were to inspect these various hatcheries, it could certify them as a permissible source of golden shiners for importation into the State.[8] In that fashion, the State

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[6]A search of Maine law does not reveal any statute or regulation which directly prohibits importation of exotic species. The effect of 12 M.R.S.A. § 7202 may in some cases stop such importation, but contains no direct prohibition.

[7]The shipment which was intercepted in this case contained some 158,000 fish. The State's expert testified that he found only golden shiners. (A. 69)

[8]The State could also satisfy itself that those hatcheries do not have any infestation of Asian tapeworm, eliminating the only arguably serious problem raised by the State.

could allow importation of golden shiners and protect its environment.

The State raises a further problem that accepted sampling techniques for baitfish have not been developed so that regulation of importation is not possible. The Court of Appeals found that this contention by the State did not square with the reality of practice of other States or even with the State's own practice with regard to cold water fish. The Court of Appeals is correct. It is established in the record that the accepted sampling techniques have not been specifically developed for baitfish because there is no need for them. The technique could be easily developed if the State so desired. (A. 270-271) The basic reason that the technique was not developed is that the parasite problems raised by the State are not considered serious enough to warrant such consideration by the industry or by any of the other 49 states or by the Congress.

The task presented to the courts when a State chooses to regulate in a fashion that impedes the flow of interstate commerce is the weighing of the legitimate local need for regulation against the national interest in promoting the free flow of commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1944). The greater the discrimination against interstate commerce, the more compelling the legitimate local need for regulation must be. When the regulation stops the flow of interstate commerce, the state must have the most compelling of reasons for doing so. Those compelling reasons are lacking in this case.

The State of Maine has failed to demonstrate any danger to its environment or fish population that must

be met with such drastic action as a total ban. The parasite problems are minor, and the State cannot even say for sure that the parasites don't already exist within the State since no survey of fish has been done since the 1950's. (A. 43, 110) The exotic species problem would be non-existent if regulated since baitfish raisers raise only one species just as trout raisers do. The limited nature of the problems cited by the State of Maine can be addressed through even-handed regulation just as it does for trout, and just as other Northeastern States do. (A. 102).

The problem with accepting the State's theory is that it is arguing against itself. On one hand it would have this Court believe that the parasite problem is so pervasive that it cannot be satisfied that "clean" fish can be imported from any source. Then it argues that it does not know what potential consequences the parasites might have for fish populations in Maine, or even if there would be any problems at all. (A. 115) In so arguing it chooses to ignore the evidence generated by the pervasiveness of the parasites. While the State's expert spoke of problems for individual fish, he did not, nor could he, identify any problems with fish population in all those States where the parasites are known to exist. The reason is that the parasites listed by the State do not cause problems, at least in the opinion of the defense expert who is widely experienced in the study of baitfish. (A. 241) The problems are insignificant when weighed against the remedy of a total ban on baitfish.

C. The State of Maine's Ban on Importation of Baitfish Constitutes Impermissible Economic Discrimination.

The State of Maine has argued that the purpose of its statute is to protect its environment and not to promote the economic interests of its residents to the exclusion of non-residents. The State offered no evidence of legislative intent in this respect, but pointed to a position paper of the Maine Department of Inland Fisheries and Wildlife. (A. 294-310) The position paper discusses the same concerns expressed by the State in the evidentiary hearing, but, more significantly also discusses the economics of raising baitfish in Maine. (A. 305-310) The conclusion of that discussion is the question "why . . . should (we) spend our money in Arkansas when it is far better spent at home?"

When a State promotes its own economic advantage by legislation, a virtual per se rule of invalidity has been erected. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), citing *H. P. Hood & Sons, Inc. v. DuMord*, 336 U.S. 525 (1949). The test for economic protectionism is not the expressed intention of the State, but is the practical impact of that legislation. "The evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia v. New Jersey* at 626. The position paper of the Department of Inland Fisheries and Wildlife constitutes strong evidence that even the State recognizes that the statute is economic protectionism and therefore invalid.

D. The Court of Appeals for the First Circuit Correctly Reviewed the Decision of the District Court.

For all the reasons set forth previously, Mr. Taylor contends that the proper standard for review of the facts and the statute in this case is strict scrutiny for all levels of courts. *Hughes v. Oklahoma,* 441 U.S. 322 (1979). The District Court paid lip service to the notion of strict scrutiny but its analysis plainly indicates the application of a preponderance of the evidence standard. When the District Court fails to apply the correct standard, the Court of Appeals must perform a *de novo* review. *Bose Corp. v. Consumers Union of United States, Inc.,* 692 F.2d 189, 195 (1982), *aff'd. Bose Corp. v. Consumers Union of United States, Inc.,* — U.S. —, 104 S.Ct. 1949 (1984). In this case, the Court of Appeals properly applied governing constitutional law, and in so doing, reversed the District Court.

The State's and government's reliance on Fed.R. Civ.P. 52(a), and its explication in *Anderson v. City of Bessemer City,* — U.S. —, 105 S.Ct. 1504 (1985), is not well founded in the context of this case. In *Anderson,* the evidentiary standard properly applied was proof by a preponderance of evidence. In that situation a Court of Appeals must properly review the factual findings under a clearly erroneous standard. The Court of Appeals in this case was not facing that situation, but one more closely analogous to *Bose Corp. v. Consumers Union of United States, Inc.,* 692 F.2d 189 (1982). In *Bose* the District Court misapplied the clear and convincing standard of evidence mandated by the Constitution to the question of knowledge or reckless disregard of falsity of statements made by defendant. *New York Times v. Sullivan,* 376 U.S. 254 (1964). The Court of Appeals correctly declined to use the clearly erroneous standard of review because the finding of facts were "predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of the United States, Inc.,* — U.S. —, —, 104 S.Ct. 1949, 1959 (1984).

The clear and convincing evidence standard was applied in *Bose* to help protect the constitutional rights of individuals. Mr. Taylor contends that the same situation exists in this case. When the District Court misapplies the strict scrutiny standard, the Court of Appeals may thoroughly review the factual record and draw its own conclusions. The Court of Appeals properly did so in this case.

—o—

CONCLUSION

The Appeal should be dismissed or the judgment of the Court of Appeals affirmed.

Respectfully submitted.

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REPLY

BRIEF

(8)

No. 85-62

In the Supreme Court of the United States

October Term, 1985

STATE OF MAINE,

Appellant,

v.

ROBERT J. TAYLOR, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF OF APPELLANT

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Argument

In his brief, Appellee Taylor asserts two grounds for upholding the decision of the Court of Appeals: (1) that unlike the District Court, the Court of Appeals subjected the Maine statute to strict constitutional scrutiny under *Hughes v. Oklahoma,* 441 U.S. 322 (1979), and invalidated the statute on the basis of the evidence introduced by Mr. Taylor at trial (Brief for Appellee at 21-26); and (2) that Mr. Taylor has a "fundamental" right to engage in interstate commerce which the District Court impugned by according the Maine statute less than strict scrutiny (Brief for Appellant at 17-21).

Both of these assertions are without merit. First, the District Court *did* subject the Maine statute to strict scrutiny and concluded on the basis of very substantial evidence that the statute satisfied both prongs of the *Hughes* test because it furthers a legitimate purpose and because there is no existing less discriminatory alternative. Mr. Taylor's argument, therefore, amounts only to an effort to reargue the facts found against him. That being the case, there is no basis for the departure by the Court of Appeals from the normal rules of appellate review of factual determinations by the trial court.

Second, there is no fundamental right to engage in interstate commerce. Thus, this Court should harmonize the Congressional policy favoring statutes such as Maine's, as manifested by the passage of the Lacey Act Amendments of 1981, with the policy of the Commerce Clause mandating a national economy by applying a more relaxed standard of scrutiny in this case.

I. *The Adequacy of the Evidence.*

The thrust of Mr. Taylor's argument concerning the adequacy of the evidence before the District Court is that the testimony of his witness as to the validity of the purpose behind the Maine statute was more credible than that presented by the State and the United States. Thus, he does not attack directly the testimony of the government experts; he merely asserts, on the basis of statements of his own expert, that the ecological concerns which the government experts detailed are really not that serious and, as a result, that the State should constitutionally be required to take the risk that no harm to its environment will result from the indiscriminate importation of live bait.

As set forth fully in the State's main brief (Brief of Appellant at 23-28) and in that of the Solicitor General (Brief for the United States at 19-24), this effort to reargue the facts completely ignores the rule that the appellate courts, including this Court, should accord considerable deference to the factual determinations of trial courts. Rule 52(a), Fed.R.Civ.P.; *Anderson v. City of Bessemer City,* —U.S.—, —, 105 S.Ct. 1504, 1511-13 (March 19, 1985); *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 175-76 (1983). Here, the trial court heard the testimony of the experts for all parties and found that of the government witnesses more credible.[1] The findings of that Court based on that evidence should not be disturbed so long as the evidence is substantial, which, as set forth by the State in its main brief, it is (Brief of Appellant at 15-22).

[1]The difficulties with the defendant's expert's testimony are set forth at note 6 of the Solicitor General's brief. (Brief for the United States at 4-5, n. 6).

One additional point requires correction. On the issue of exotic species, Mr. Taylor suggests at two places in his brief that the State does not prohibit the importation of exotic fish such as goldfish, which pose a greater threat to the State's ecology than bait fish, and that this failure contradicts the State's asserted concern about the importation of exotic species in shipments of live bait (Brief of Appellee at 9 and 24, n. 6). This argument misapprehends Maine law. Certain kinds of tropical fish and goldfish are allowed to be imported into the State, with a permit, *but only for aquarium purposes. See* 12 M.R.S.A. § 7377(5), creating an exception to 12 M.R.S.A. §7202, which allows the introduction of salmonids. Maine does not allow the introduction of exotic fish, other than salmonids, into the wild.

II. *Commerce Clause Scrutiny Under the Lacey Act Amendments.*

In Part IV of its main brief, the State suggested that its statute should not in any event have been subjected to traditional strict scrutiny of discriminatory measures under the Commerce Clause, because such scrutiny would frustrate Congressional intent manifested in the Lacey Act Amendments of 1981 (Brief of Appellant at 29-35).[2] Mr. Taylor does not address this point directly, but argues obliquely that his ability to engage in interstate commerce protected by the Commerce Clause should be elevated in status to that of a "fundamental" right (Brief for Appellee at 17-21).

[2]In his brief, the Solicitor General argues that the Lacey Act Amendments cannot be viewed as completely insulating state laws within its purview from Commerce Clause scrutiny. (Brief for the United States at 27-28, n. 26). The State does not disagree. However, the Solicitor General has apparently not considered whether the Lacey Act Amendments suggest that a lower standard of review is appropriate to this case.

Contrary to Mr. Taylor's contention, however, this Court has not found the right to engage in interstate commerce to be fundamental, requiring strict scrutiny. *See San Antonio School District v. Rodriguez,* 411 U.S. 1, 29-39 (1979) (not all rights "fundamental" for purpose of the Equal Protection Clause). This is demonstrated by its long-standing practice of reviewing nondiscriminatory legislation under the more lenient "rational basis" test. *E.g., Hodel v. Virginia Surface Mining and Reclamation Ass'n.,* 452 U.S. 264, 276 (1981).[3] Where state legislation is concededly discriminatory, strict scrutiny would ordinarily apply for that reason. However, strict scrutiny in this case would conflict with Congress's intent in the Lacey Act Amendments that states be allowed to erect barriers to interstate commerce to protect their ecologies (Brief of Appellant at 29-36).

[3]For general discussions of the status of rights created by the Commerce Clause, see B. Gavit, Commerce Clause 32-33 (1932) ("The Commerce Clause created no rights or privileges; it established no law other than the jurisdiction to regulate those engaged in interstate or foreign commerce"); Dowling, Interstate Commerce and State Power, 27 Va. L.Rev. 1, 22-23 (1940) ("It is true that the litigation is between private parties, but the issue touches the relative jurisdiction of nation and state.")

Conclusion

For the foregoing reasons, this Court should reverse the decision of the Court Appeals.

Respectfully submitted,

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